Indian Claims Commission

THE KEY FIRST NATION INQUIRY

Report on: 1909 Surrender

102-02614/

Indian Claims Commission

Commission des revendications des Indiens

March 27, 2000

Chief Carey O'Soup and Council
The Key First Nation

The Honourable Robert Nault
Minister of Indian Affairs and Northern Development

The Honourable Anne McLellan
Minister of Justice and Attorney General of Canada

RE: The Key First Nation Inquiry - 1909 Surrender Claim

On September 2, 1994, The Key First Nation wrote the Commission requesting an inquiry into its rejected claim. The Commission began its work by convening a planning conference on September 12, 1995, where the parties discussed the issues pertaining to this claim and the conduct of the inquiry.

This inquiry deals with whether the claim of The Key First Nation discloses a breach of Canada's "lawful obligation" to the First Nation under the Specific Claims Policy. In the course of our deliberations, the Commission reviewed hundreds of pages of documents related to this inquiry and conducted three information-gathering sessions at the The Key First Nation on January 24, 1996, November 20, 1997, and March 10, 1998. On June 14, 1999, the Commission heard oral submissions from counsel for the parties on the legal issues raised in this inquiry.

Our review of the facts of this claim, together with our legal analysis, findings, and recommendation to the parties, is set out in the attached report, which we are honoured to present to you on this date.

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INDIAN CLAIMS COMMISSION

THE KEY FIRST NATION INQUIRY
1909 SURRENDER CLAIM

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EXECUTIVE SUMMARY

HISTORICAL BACKGROUND

Since the middle of the 19th century, Chief The Key and his followers had resided in the vicinity of the Shoal River in southwestern Manitoba, where they hunted, fished, and pursued employment with the Hudson's Bay Company. Their homeland was part of the territory ceded to the Crown by the terms of Treaty 4 in 1874, although The Key Band did not adhere to treaty until September 1875. They had some ground under cultivation by the time of their adherence to treaty, but they did not receive a reserve until 1878, when some 31,000 acres of land were surveyed for them at Swan River. In 1880, officials of the Department of Indian Affairs decided that the likelihood of annual flooding made the location of the reserve unsuitable and encouraged the Band to relocate to the Fort Pelly district, about 90 miles to the southwest.

Chief The Key, together with 12 families, was agreeable to the move, and this group relocated permanently to Fort Pelly in 1882. The majority of the Band, however, refused to leave their traditional homeland. Under the leadership of Headman John Beardie, the group resident at Shoal River petitioned the Department of Indian Affairs in 1882, 1884, and 1885 for their own reserve at that location, stating that they had no interest in relocating to a new reserve at Pelly and repudiating the leadership of Chief The Key. The department did not consider it advisable to grant their request, however, and proceeded on the assumption that the entire Band would eventually settle at Pelly. As a result, a reserve sufficient in size for 190 people was surveyed in 1883 for The Key Band at Pelly, even though only 83 band members resided at that location. The new reserve, Indian Reserve (IR) 65, was formally confirmed by Order in Council in May 1889 and withdrawn from the operation of the *Dominion Lands Act* in June 1893.

In 1889, the Department of Indian Affairs finally acceded to the repeated requests of the Shoal River Indians and began to survey a number of small reserves for their use in the vicinity of Shoal River. Several of the orders in council confirming these reserves appeared to indicate that they had been set aside for the entire Key Band, but at least one of them referred merely to "the Indians of Treaty No. 4." Until 1902, the Shoal River Indians were listed on one paylist with the followers of Chief The Key and required to travel to Pelly for their annuity payments. From 1902 onward, however, the Shoal River Indians were placed on a separate paylist entitled "Shoal River Band Paid at Shoal River Reserve," and administrative responsibility for them was transferred to a separate agency.

In the meantime, the followers of Chief The Key had established themselves at Pelly and had begun to cultivate grain and garden crops, although their progress was slow. They appeared to be more successful at stock raising, and, in support of this activity, the department set aside 20 square miles of haylands in 1893 for communal use by the three Pelly Agency Bands, including The Key Band. By 1899, however, approximately one-half of the haylands were required by the Department of the Interior for other purposes, leaving only 6,000 acres for the use of the three bands.

As a result, in 1902–03, the Department of Indian Affairs put forward a plan to exchange less valuable lands within the three reserves for the remaining haylands. Officials of the department instructed Agent H.A. Carruthers to approach The Key Band to discuss the surrender and exchange proposal, and a meeting was held at IR 65 on December 14, 1903. At that time, a majority of the Band indicated their assent to the surrender of a strip of land on the west side of the reserve in exchange for a portion of the haylands, as well as the surrender and sale of a strip of land on the east side of the reserve to fund the acquisition of machinery and horses for the Band. Chief The Key voted against the proposal, in the agent's opinion, because it was "the thin edge of the wedge, and ... his whole Reserve would ultimately be taken from him." According to the agent, Chief The Key acknowledged, however, that the plan was in the best interests of the Band. In any event, the 1903 surrender proposal never materialized, and the department did not discuss the subject of surrenders with The Key Band again until 1908.

In the early years of the 20th century, the dominion government initiated a policy of encouraging non-aboriginal agricultural settlement on the prairies. In support of this policy, the Department of Indian Affairs promoted surrenders and sales of reserve land in those areas where it considered that the Indians were holding tracts of farming land beyond their possible requirements. To facilitate the policy, the *Indian Act* was amended in 1906 to permit the department to advance up to 50 per cent of the anticipated sale proceeds to a band immediately on surrender. The advance could be used to provide agricultural provisions, support for the elderly, and other such items, thereby giving departmental officials considerable flexibility in negotiating surrenders.

In the spring of 1908, Dr E.L. Cash, the local Member of Parliament and one-time departmental medical officer for the Pelly Agency, wrote to the department about a possible surrender of The Key reserve. In response, Deputy Superintendent General Frank Pedley advised him that the department was not aware of any desire by the Band to surrender its reserve. In July 1908, Agent W.G. Blewett at Pelly told Inspector W.M. Graham that members of The Key Band wished to sell 13 sections of their reserve land because they had "too much land and not enough horses and implements." The land to be surrendered was identified as a one-mile-wide strip on the west side of the reserve, and a one-and-one-half-mile-wide strip on the east side of the reserve. It was also stipulated that each band member would receive an immediate payment of $80 at the time of surrender. Blewett supported the proposal, as did Graham, although the latter noted that he required a decision concerning the right of the Shoal River Indians to vote on the surrender.

In January 1909, Graham reported that he had held a meeting with members of The Key Band to discuss the surrender and had persuaded them to surrender 17 sections of reserve land instead of the 13 sections originally contemplated. He also noted that the Band had requested that the immediate payment be increased to $100, an amount he considered reasonable.

No immediate action was taken to obtain the surrender, and in April 1909 Agent Blewett wrote to his superiors conveying the concern expressed by members of The Key Band over the delay. Graham finally arrived at The Key reserve to take the surrender on May 18, 1909, and subsequently reported to the Deputy Superintendent General that "nearly all the members of the Band were present and the vote was unanimous." The surrender document bears the purported marks of five band members and the signatures of two other band members, although no record exists of how many attended or voted in favour. A surrender paylist bearing the same date as the surrender indicates that 87 band members were paid the contemplated $100 advance. An affidavit of Inspector Graham and of Chief The Key, dated May 19, 1909, attests that the surrender meeting was held and that the surrender was assented to by a majority of the male members of the Band of the full age of 21 years and present at the meeting. This document bears Graham's signature and the purported mark of Chief The Key.

All the documentation was forwarded to the Privy Council, and the surrender of 11,500 acres was accepted by Order in Council in June 1909. The surrendered land was offered for sale by public auction on December 1, 1910, although not all of it was sold at that time. In November 1910, a second parcel of land was surrendered for sale to the Anglican Church, and the following year the unsold land from the first surrender was again offered for sale by auction. Shortly afterwards, members of the Band made inquiries about the interest payments that were due them under the terms of the 1909 surrender, and funds from this source were distributed to the Band in 1913 and 1914. There is no evidence that any band member ever made a contemporary complaint about the 1909 surrender.

ISSUES

The broad question before the Indian Claims Commission in this inquiry is whether the claim of The Key First Nation discloses a breach of Canada's "lawful obligations" to the First Nation under the Specific Claims Policy. Canada and the First Nation have agreed that an assessment of the validity of the claim requires consideration of the four issues that follow:

ISSUE 1 Was there a valid surrender in 1909 of a portion of The Key reserve by The Key Band?

In particular, were the Treaty 4 provisions regarding the consent of bands to the alienation of their reserve lands complied with?

ISSUE 2 Was the *Indian Act*, RSC 1906, c. 81, complied with?

In particular, did a majority of the male members of The Key Band who were 21 years of age and over assent to the surrender?

ISSUE 3 Were the Shoal River Indians members of The Key Band at the time of the surrender in 1909, and, if so, were they entitled to vote on the surrender?

ISSUE 4 Did Canada have any pre-surrender fiduciary obligations to The Key Band and, if so, did Canada fulfil or did Canada breach any such fiduciary obligations with respect to the surrender of 1909?

In particular, was the surrender obtained as a result of undue influence or misrepresentation?

LEGAL ANALYSIS AND FINDINGS

Issue 1: Treaty 4 "Consent"

The First Nation submits that the terms of Treaty 4 establish a higher threshold of "consent" required for reserve land surrenders than the provisions of the *Indian Act* and, in particular, that the treaty-mandated "consent" should be interpreted by reference to the First Nation's tradition of clan governance. In accordance with the decision of the Supreme Court of Canada in *R. v. Marshall*, the First Nation relies on extrinsic evidence, in this case oral history evidence, in support of its submission that the Band's traditional decision-making process was intended to have the force of a treaty right. Canada relies on a previous determination of the Commission to the effect that no conflict exists between the terms of the treaty and the surrender provisions of the Act, as the former did not establish a required level of consent or a means of expressing consent to surrenders. Further, Canada submits that there is no compelling extrinsic evidence to support the First Nation's submission that the treaty should be interpreted in the way it alleges. The Commission, in considering the submissions and the decision of the Supreme Court in *Marshall*, notes that the legal test appears to require that the common intention of the parties at the time the treaty was made be ascertained. In this inquiry, the Commission finds that there is no evidence that, ***at the time Treaty 4 was made***, the parties intended to establish within its terms a standard or threshold of consent for the surrender of land. As a result, there is no evidence of a conflict between the terms of the treaty and the provisions of the *Act*.

Issue 2: Compliance with *Indian Act* Procedures

The surrender provisions of section 49(1) of the *Indian Act* contemplate five mandatory components: that a meeting be summoned for the express purpose of considering the surrender; that the meeting be held in accordance with the rules of the band; that it be held in the presence of an authorized officer; that a majority of the male members of the band 21 years of age and older attend the meeting; and that a majority of those members vote in favour of the surrender. The parties have focused their submissions on the first and fourth of the above criteria.

The First Nation submits that there is insufficient evidence to establish that there was compliance with the mandatory requirements of the *Act*, based on the general lack of detailed documentary evidence concerning events on the day of the surrender, the lack of oral history concerning the event, and the testimony of a handwriting expert to the effect that the "X" marks on the documents were not authentic. Canada submits that the existing documents should be accepted at face value in support of the conclusion that the requirements were met, as the pre-surrender and post-surrender conduct of the Band is consistent with such a conclusion. Canada questions the evidentiary value of the oral history in this inquiry and takes the position that the testimony of the handwriting expert is irrelevant.

The Commission notes that the Specific Claims Policy places the burden on the claimant to establish that Canada breached its lawful obligations in obtaining the surrender. In this context, the Commission holds that the *absence* of oral history evidence is not determinative of the issue of compliance with the *Act*, and that all the evidence must be considered to arrive at a conclusion.

With respect to the handwriting expert's testimony, the Commission holds that, even if his evidence were to be accepted in its entirety, it would not determine the fundamental questions about the meeting and the proper majority consent, since it is possible that band members authorized another individual to make the "X" marks on their behalf. As a result, this evidence is not relevant to the determination.

Owing to the scarcity of documentary evidence about events surrounding the surrender itself, the Commission has examined evidence that preceded and followed the surrender, an approach it believes is consistent with the intention-based approach mandated by the Supreme Court in the *Apsassin* case. Based on this evidence, which is consistent with a theory that proper procedures were followed, the Commission concludes that the First Nation has not discharged the burden upon it to establish that Canada did not comply with the surrender provisions of the *Indian Act*.

Issue 3: Shoal River Indians

The provisions of the *Indian Act* require that a surrender be assented to by a majority of eligible voting members of the Band who habitually reside on or near, and are interested in, the reserve in question.

The First Nation has taken the position that the surrender is invalid because the Shoal River Indians did not vote on it, and that the addition of their numbers to the eligible voting population would mean that the *Act*'s majority voting requirements were not met. Canada takes the view that the Shoal River Indians were an autonomous band within the meaning of the *Act* and, as a result, were not part of the eligible voting population. In the alternative, Canada submits that the Shoal River Indians were not habitually resident on or near, or interested in, IR 65 at the time of the surrender and were therefore ineligible to vote on that basis.

Although the *Indian Act* does not define a "band," the Commission has previously held that a body of Indians must live as a "collective community" under the auspices of the *Act*, in order to be considered a "band" within the meaning of the *Act*. Based on the evidence concerning the mutual intention of the Shoal River Indians and the followers of Chief The Key to live as separate autonomous entities, the Commission holds that the two were not one "band" for the purposes of the surrender provisions of the *Act*.

In the alternative, given the fact that the Shoal River Indians did not travel to IR 65 after 1902 for any purpose, and given their repeated disavowal of any interest in the reserve, the Commission holds that they were not habitually resident on or near, or interested in, the reserve at the time of the surrender. As a result, the Commission holds that the Shoal River Indians were not eligible to vote on the surrender and that its validity cannot be challenged on the basis of their failure to vote or to attend the meeting.

Issue 4: Pre-surrender Fiduciary Duty

The Supreme Court in *Apsassin* has established at least four benchmarks by which the Crown's conduct in the exercise of its pre-surrender fiduciary duty will be measured: where the Band's understanding of the terms of the surrender is inadequate; where the Crown has engaged in "tainted dealings"; where the Band cedes or abnegates its decision-making authority; and where the surrender is so foolish and improvident that it must be considered exploitative.

Further, as there is evidence that the dominion government faced conflicting pressures in the form of preserving the land for the Band, on the one hand, and, on the other, making it available for agricultural settlers, Canada bears the onus, according to Justice McLachlin in *Apsassin*, to demonstrate that it did not breach its fiduciary duty to the Band.

Counsel for the First Nation has submitted that representatives of the Department of Indian Affairs were under a duty to inform band members of various options, consequences, and factors relevant to the surrender in order to ensure that their understanding was adequate, within the meaning of *Apsassin.* Given the passage of 90 years since the surrender, the Commission concludes, as did the trial judge in *Apsassin,* that Canada is not required to establish by positive evidence that each and every matter raised by counsel for the First Nation was explained to the Band in 1909. Canada *is* required, in the Commission's view, to establish that the members of the Band understood that, by assenting to the surrender, they were giving up forever all rights to their reserve. Based on the evidence that Chief The Key reportedly understood in 1903 that a surrender involved a "taking" of land, and based on the actions of the Band in 1908 and 1909 in initiating surrender discussions and renegotiating the terms of the surrender, the Commission finds that the Band's understanding of the 1909 surrender was "adequate" within the meaning of *Apsassin.*

With respect to the issue of whether Canada's conduct was "tainted," the Commission notes that, in 1909, the dominion government had in place policies to encourage surrenders in order to facilitate non-aboriginal settlement. The Commission is also mindful of Inspector Graham's report that he "persuaded" the Band in January 1909 to surrender 17 sections of land instead of the 13 originally contemplated. The Commission finds on the evidence, however, that surrender discussions between the parties took place over a ten-month period and that, on one occasion, the Band renegotiated a term in its favour. The Commission also notes that the circumstances of this surrender did not include a concerted and sustained campaign of pressure on the Band to surrender its land. As a result, the Commission holds that Canada has discharged the onus upon it to establish that its dealings with the Band were honourable.

In determining whether The Key Band ceded or abnegated its decision-making power over the surrender to the Crown, the Commission has noted that there is no evidence that the Band was lacking in effective leadership at the time of the surrender, or that representatives of the department sought to obtain a surrender despite all obstacles. Rather, the Commission finds that the Band initiated surrender discussions, that it renegotiated one of the terms in its favour, that it made inquiries as to when the surrender might be expected, and that, after the fact, it took an interest in the receipt of sale proceeds. As a result, the Commission holds that the Band did not cede its decision-making power over the surrender to the Crown.

With respect to the issue of whether the surrender was "exploitative," the Commission takes the approach that the determination must be made from the perspective of the Band at the time of the surrender. In accordance with our decisions in previous inquiries, the Commission has looked at the impact of the surrender on the Band's way of life and, in particular, whether the land remaining after the surrender would be sufficient to satisfy its foreseeable agricultural needs. As a result, the Commission finds that, although the surrender took almost one half of the reserve, it did not take only the best land; moreover, the Band was left with some 8,000 acres of arable land and some 5,000 acres of grazing land. Given that the Band comprised 80 to 90 members at the time, and that it had cultivated only some 100 acres of the reserve, the Commission finds that the land remaining was sufficient to provide for the Band's foreseeable agricultural needs. As a result, the Commission holds that the surrender was not "exploitative" within the meaning of *Apsassin*.

PART I

INTRODUCTION

BACKGROUND TO THE INQUIRY

This report addresses a specific claim submitted to the Minister of Indian Affairs by The Key First Nation[1] on June 19, 1989, alleging that a 1909 surrender of 11,500 acres from Indian Reserve (IR) 65 near Norquay, Saskatchewan, was invalid because the Government of Canada had "breached its lawful and beyond lawful obligations in obtaining the alleged surrender of Key Reserve lands in 1909."[2] More specifically, the First Nation alleges that the surrender was obtained through undue influence, negligent misrepresentation, and non-compliance with the surrender provisions in section 49 of the 1906 *Indian Act*.

Following a review by the Department of Indian Affairs and Northern Development (DIAND) and the Department of Justice, Carol Cosco, Claims Analyst at Specific Claims West, DIAND, in a letter dated March 2, 1993, informed the Chief and Council of The Key Band of the federal government's position with regard to each allegation.[3] According to Ms Cosco's letter, the Government of Canada was of the view that the government officials of the day had not only acted according to the law, but had also acted in the best interests of the First Nation when arranging the surrender and sale of The Key Band reserve lands in 1909.

Two years after Canada's rejection of the claim, The Key First Nation formally requested that the Indian Claims Commission (ICC) conduct an inquiry into the 1909 surrender claim.[4] The Commissioners informed Canada of their decision to conduct the inquiry in September 1995.[5]

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[1] Alternatively referred to as "The Key Band," the "First Nation," or the "Band," depending on the historical context.

[2] See Chief Dennis O'Soup to Pierre Cadieux, Minister of Indian Affairs, June 19, 1989 (ICC Documents, p. 661), and "Key Land Claim Submission," prepared for the Federation of Saskatchewan Indian Nations, undated (ICC Documents, p. 665).

[3] Carol Cosco, Specific Claims West, DIAND, to Chief and Council, The Key Band, March 2, 1993 (ICC Documents, pp. 729–32).

[4] Band Council Resolution (BCR) 226, March 2, 1995 (ICC file 2107-21-01).

[5] Daniel Bellegarde and James Prentice, Co-Chairs, ICC, to the Honourable Ron Irwin, Minister of Indian and Northern Affairs, and the Honourable Allan Rock, Minister of Justice and Attorney General, September 25, 1995 (ICC file 2107-21-01).

MANDATE OF THE COMMISSION

The mandate of this Commission is set out in federal Orders in Council providing the Commissioners with the authority to conduct public inquiries into specific claims and to issue reports on "whether a claimant has a valid claim for negotiation under the [Specific Claims] Policy where the claim was already rejected by the Minister."[6] This Policy, outlined in DIAND's 1982 booklet *Outstanding Business: A Native Claims Policy – Specific Claims*, states that Canada will accept and negotiate claims that disclose an outstanding "lawful obligation" on the part of the federal government.[7] The term "lawful obligation" is defined in *Outstanding Business* as follows:

> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
> ii) A breach of an obligation arising out of the Indian Act or other statutes pertaining to Indians and the regulations thereunder.
> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
> iv) An illegal disposition of Indian land.

Furthermore, Canada is prepared to consider claims based on the following circumstances:

> i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.
> ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where fraud can be clearly demonstrated.[8]

This report contains the Commission's findings and recommendations on the merits of The Key First Nation's 1909 surrender claim.

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[6] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991; reprinted in (1994) 1 ICCP xiii.

[7] DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in (1994) 1 ICCP 171-85 (hereafter *Outstanding Business*).

[8] *Outstanding Business*, 20; reprinted in (1994) 1 ICCP 179, 180.

PART II

HISTORICAL BACKGROUND

PRIOR TO TREATY

The people of The Key First Nation are descendants of the Saulteaux[9] – an Ojibway group that migrated west from the Great Lakes region towards the end of the 18th century. The history of the Saulteaux/Ojibway migration from Ontario to the prairies of western Canada has been addressed elsewhere and need not be recounted in detail here.[10] For the purpose of this report it is sufficient to recount that, as active participants in the fur trade, the Saulteaux moved west into the south-central regions of present-day Manitoba as their allies, the Cree, moved farther west into Saskatchewan and Alberta. According to the trade historian Arthur J. Ray, the Cree vacated the territory in southern Manitoba to maintain their position as middlemen in the fur trade within the Hudson Bay basin, as well as to exploit the provisioning trade that had developed as the competing fur trade companies became more dependent on the use of pemmican as a staple. Therefore, when the lands of southern Manitoba were depleted of furs, the Cree moved west to hunt the buffalo.[11]

This migration eventually resulted in the Saulteaux extending themselves from southern Manitoba, northwest into the Swan River and Cumberland districts of west-central Manitoba, and into Saskatchewan along the Assiniboine River as far its confluence with the Souris River. In this manner, the Saulteaux came to reside along the forest fringe or "parklands" of southern Manitoba and Saskatchewan – the area of land where the forest and prairie converged.

Once established in the parkland/forest fringe, the Saulteaux adapted some of the cultural traits of their allies, the Plains Cree and Assiniboine. From the shelter of the parkland, they entered the plains to participate in the seasonal buffalo hunt. The Saulteaux, however, did not fully abandon

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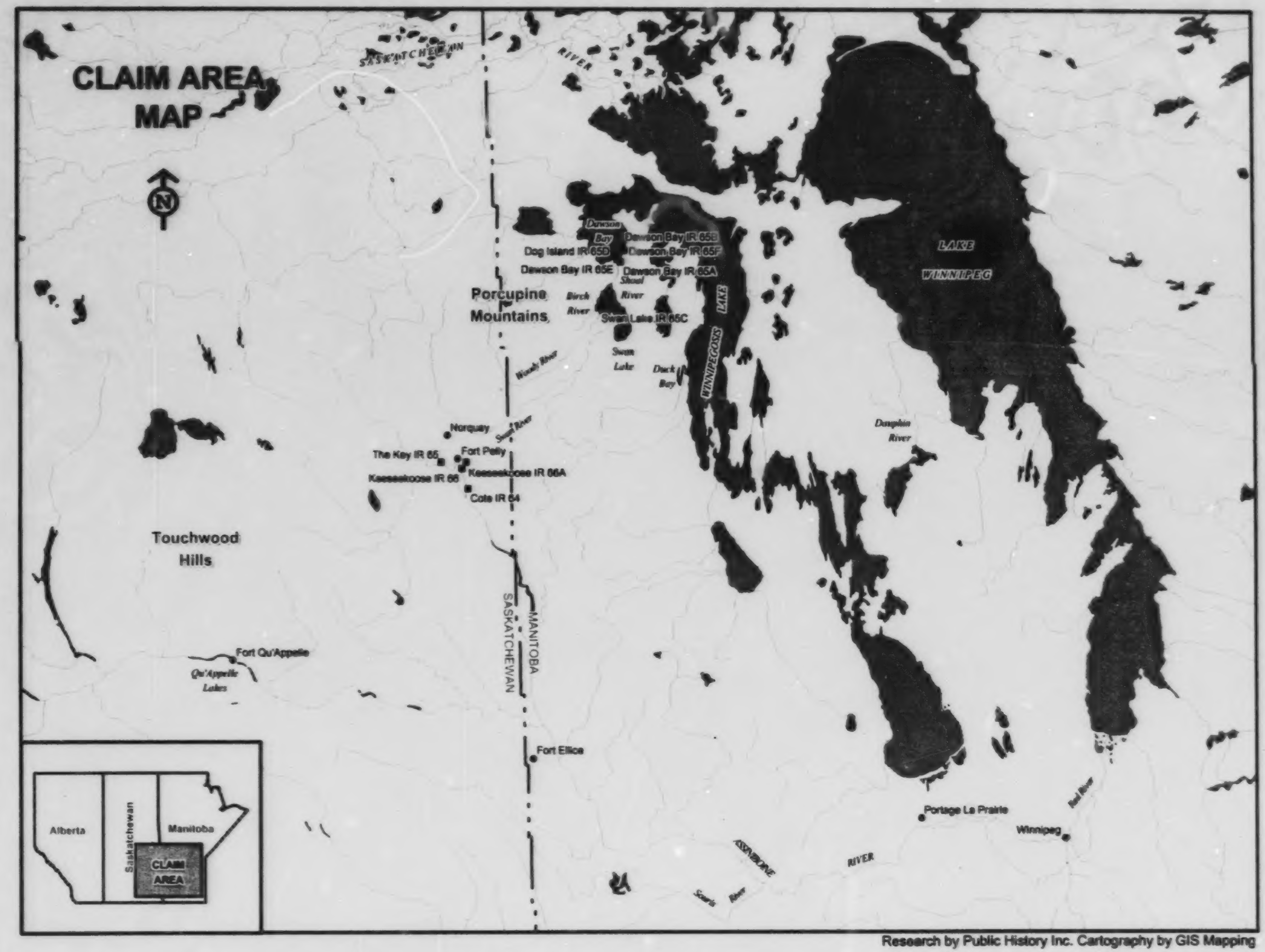
[9] The Saulteaux are one of four tribes that together constitute the Ojibway Nation. The others are the Ottawa, Mississauga, and Potawatomi tribes. The Saulteaux first came into contact with European traders on the eastern shores of Lake Superior. The term "Saulteaux" was originally applied to one particular group of Ojibway people that had persistent dealings with the French fur traders near present-day Sault Ste Marie. The traders called them "Saulteur" – the French word for "people of the rapids" – referring to their origins at Sault Ste Marie. The plural form of the term is "Saulteaux." For more information, see Alan D. McMillan, *Native Peoples and Cultures of Canada* (Vancouver: Douglas & McIntyre, 1988), 93–101.

[10] For a concise account of Ojibway migrations during the historical era, see Laura Peers, *The Ojibway of Western Canada, 1780–1870* (Winnipeg: University of Manitoba Press, 1994), 3–61.

[11] See Arthur J. Ray, *Indians and the Fur Trade: Their Roles as Hunters, Trappers and Middlemen in the Lands Southwest of Hudson Bay, 1660–1870* (Toronto: University of Toronto Press, 1974), 102.



Research by Public History Inc. Cartography by GIS Mapping the cultural traits practised during their residency in the Great Lakes district – fishing continued as a significant source of foodstuffs, and medicine rituals such as the Midewiwin lodge remained in common use. The traditional clan organization of membership, based on patrilineal inheritance organized into the primary totems of the crane, catfish, bear, martin, wolf, and loon clans, also remained intact.[12] In general, Saulteaux life remained tied to the annual cycle of subsistence based on set patterns of hunting, fishing, and plant gathering, a system compatible with participation in the fur trade.

The Followers of Chief Ow-tah-pee-ka-kaw – "The Key"

According to one historian of The Key First Nation, the followers of Chief Ow-tah-pee-ka-kaw – "He Who Unlocks" or "The Key" – had resided along the Shoal River in the Dawson Bay/Swan Lake region of southwestern Manitoba since the middle of the 19th century.[13] The waterways west of Lake Winnipeg and the Red River settlement – particularly the Assiniboine River, Dauphin River, Lakes Manitoba and Winnipegosis, and the Swan and Saskatchewan rivers – had long served as the means of transportation for the fur trade. As such, The Key Band's residency along one of these prominent water routes provided its members with ready access to various fur-trading posts. The advantageous location at Shoal River also provided the group under Chief The Key with new neighbours who would become band members. According to the Reverend Harry B. Miller, several members of the Brass family – descendants of an Orkneyman employee of the Hudson's Bay Company (HBC) and his aboriginal wife – chose to settle with the Band after their retirement from active service with the company:

> Peter and Susan Brass parented a family of nine; five boys and four girls. The boys were Peter, John, George, William and Thomas ... All five of the boys, it would appear, entered either the apprentice program or the labour force of the Hudson's Bay Company, through which experience they acquired the skills that, in later life, were to prove so beneficial as they set about to build homes, schools, mission house, and

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[12] See Alan D. McMillan, *Native Peoples and Cultures of Canada* (Vancouver: Douglas & McIntyre, 1988), 94–95, 140–41.

[13] Rev. Harry B. Miller, *These Too Were Pioneers: The Story of the Key Indian Reserve No. 65 and the Centennial of the Church, 1884–1984* (Melville, Sask.: Seniors Consulting Service, 1984), 16 (ICC Exhibit 6).

> church; and to establish themselves on the Key Reserve ... Following the time of apprenticeship, each served the Company throughout the Swan River district until retiring and joining Chief Key and his followers at Shoal River.[14]

The membership of The Key Band included both Saulteaux and mixed-blood individuals at the time of treaty. Both groups lived in harmony with each other under the acknowledged leadership of Chief The Key.

Adherence to Treaty 4

The early 1870s represented a period of great transition among the Indian Nations that resided within the 75,000 square mile area of Treaty 4. Once the buffalo disappeared and white settlers moved into the area, some bands took steps to convert from the life of the hunter-gatherer to reserve agriculturalists. The increasing scarcity of buffalo and other game led to periods of hardship, even starvation, and greater competition for the remaining food resources. Furthermore, the sale or transfer of their homeland from the administration of the HBC to the jurisdiction of the Dominion of Canada in 1869–70 had created a feeling of great unease among the aboriginal peoples of the plains. In an effort to provide their people with the means to survive within this ever-changing climate, many Indian leaders subsequently called on the Queen to negotiate binding treaties that would assist their people in adapting to the new realities of western expansion while at the same time protecting their rights to the unoccupied lands of western Canada.[15] The Government of Canada also sought to conclude peaceful arrangements with the aboriginal peoples occupying "Rupert's Land" – the vast territory acquired from the HBC. As a result, the first of the "numbered treaties" between Canada and the Saulteaux and Ojibway Indians of southern Manitoba and northwest Ontario – Treaties 1, 2, and 3 – were concluded between 1870 and 1873.

During the summer of 1874, the dominion government initiated the process by which Treaty 4 was to be signed with the Indian Nations residing within the "Fertile Belt" located along the southern portion of the North-West Territories, within present-day Saskatchewan and southwestern Manitoba. Authorization was granted by Order in Council PC 944, dated July 23, 1874:

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[14] Rev. Harry B. Miller, *These Too Were Pioneers: The Story of the Key Indian Reserve No. 65 and the Centennial of the Church, 1894–1984* (Melville, Sask.: Seniors Consulting Service, 1984), 9 and 16 (ICC Exhibit 6).

[15] E. Blair Stonechild and Bill Waiser, *Loyal till Death: Indians and the North-West Rebellion* (Edmonton: Fifth House Publishers, 1997), 5–8. See also Olive P. Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (Toronto: McClelland & Stewart, 1992), 273–83.

> On a memorandum, dated 20th July 1874, from the Honorable the Minister of the Interior, stating that he has had before him a Minute of the Council of the North West [sic] of the 14th March last, recommending that Treaties should this year be concluded with the Tribes of Indians inhabiting the Territory therein indicated, lying West of the Boundary of Treaty No. 2, and between the International Boundary line and the Saskatchewan.
>
> That he has also had before him several Despatches from the Lieutenant Governor of later date urging the necessity of these Treaties.
>
> That looking to these representations and to the fact that the Mounted Police Force is now moving into the Territory in question with a view to taking up their winter quarters at Fort Pelly, and considering the operations of the Boundary Commission which are continually moving westward into the Indian Country, and also the steps which are being taken in connection with the proposed Telegraph Line from Fort Garry westward, all of which proceedings are calculated to further unsettle the Indian mind, already in a disturbed condition; he recommends that three Commissioners be appointed by His Excellency the Governor General for the purpose of making Treaties during the current year with such of the Indian Bands as they may find it expedient to deal with.[16]

At the time, Alexander Morris was Lieutenant Governor of the area that then comprised Manitoba and the North-West Territories, including present-day Saskatchewan and Alberta. Together with David Laird, the federal Minister of the Interior, and W.J. Christie, a retired factor with the HBC, Morris was commissioned by the Government of Canada to conclude the proposed treaty with the various Indian Nations of the Fertile Belt.

In August 1874, the Treaty Commissioners departed to meet with the Indian Nations that had agreed to convene at Fort Qu'Appelle the following month. From September 8 until September 15, 1874, the three Treaty Commissioners discussed the terms of the proposed treaty with the assembled Chiefs. Initially reluctant to agree to the terms offered by the Crown's representatives, the Indian leaders eventually accepted the promises contained within the treaty agreement and, in exchange, agreed to cede their people's rights to the lands within the treaty boundaries. Their agreement, however, was not given without some apprehension. Morris's reports noted some of the Chiefs' concerns that the position of the HBC was unfairly advantageous, and that the rights of existing and future generations of the aboriginal peoples were not adequately protected. Morris attempted to allay these concerns in discussions with the Chiefs as he outlined the government's position with regard to the treaty:

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[16] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), 3 (ICC Exhibit 15).

> What the Queen and her Councillors would like is this, she would like you to learn something of the cunning of the white man. When fish are scarce and the buffalo are not plentiful she would like to help you put something in the land; she would like that you should have some money every year to buy things you need. If any of you would settle down on the land, she would give you cattle to help you; she would like you to have some seed to plant. She would like to give to you every year, for twenty years, some powder, shot and twine to make nets of. I see you here before me to-day. I will pass away and you will pass away. I will go where my fathers have gone and you also, but after me and after you will come our children. The Queen cares for you and for your children, and she cares for the children that are yet to be born. She would like to take you by the hand and do as I did for her at the Lake of the Woods last year. We promised them and we are ready to promise now to give five dollars to every man, woman and child, as long as the sun shines and water flows. We are ready to promise to give $1,000 every year, for twenty years, to buy powder and shot and twine, by the end of which time I hope you will have your little farms. If you will settle down we would lay off land for you, a square mile for every family of five.[17]

On September 15, 1874, the final day of the conferences, the Commissioners convinced the assembled Cree and Saulteaux Indians to sign Treaty 4, which was substantially identical to Treaty 3, concluded the year before. Morris recorded the event as follows:

> The Chiefs then signed the treaty, after having been assured that they would never be made ashamed of what they then did.
>
> One of the Chiefs on being asked to do so signed; the second called on said he was promised the money when he signed, and returned to his seat without doing so. The Lieutenant-Governor called him forward – held out his hand to him and said, take my hand; it holds the money. If you can trust us forever you can do so for half an hour; sign the treaty. The Chief took the Governor's hands and touched the pen, and the others followed. As soon as the treaty was signed the Governor expressed the

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[17] Alexander Morris, *The Treaties of Canada with the Indians* (Toronto: Belfords Clark, 1880; Coles Reprint, 1971), 92–93 (ICC Documents, p. 30).

> satisfaction of the Commissioners with the Indians, and said that Mr. Christie and Mr. Dickieson, the Private Secretary of the Minister of the Interior, were ready to advance money presents, but the Indians requested that the payments should be postponed till next morning, which was agreed to. The Chiefs then formally approached the Commissioners and shook hands with them, after which the conference was adjourned.[18]

The treaty document included the following provisions:

> The Cree and Saulteaux Tribes of Indians, and all other the [sic] Indians inhabiting the district hereinafter described and defined, do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada for Her Majesty the Queen, and her successors forever, all their rights, titles and privileges whatsoever to the lands included within the following limits. ... [The treaty then sets forth a metes and bounds description of the land ceded.]
>
> As soon as possible after the execution of this treaty Her Majesty shall cause a census to be taken of all the Indians inhabiting the tract hereinbefore described, and shall, next year, and annually afterwards for ever, cause to be paid in cash at some suitable season to be duly notified to the Indians, and at a place or places to be appointed for that purpose, within the territory ceded, each Chief twenty-five dollars; each Headman, not exceeding four to a band, fifteen dollars; and to every other Indian man, woman and child, five dollars per head; such payment to be made to the heads of families for those belonging thereto, unless for some special reason it be found objectionable.[19]

The treaty further provided that reserves were to be selected by officers of the government in consultation with the interested band, "to be of sufficient area to allow one square mile for each family of five, or in that proportion for larger or smaller families" (128 acres per person). Treaty 4 also contained a number of provisions providing for the protection of reserve lands after the reserves had been established:

> ... the aforesaid reserves of land, or any part thereof, or any interest or rights therein, or appurtenant thereto, may be sold, leased or otherwise disposed of by the said

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[18] Alexander Morris, *The Treaties of Canada with the Indians* (Toronto: Belfords Clark, 1880; Coles Reprint, 1971), 123 (ICC Documents, p. 45).

[19] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), 5–8 (ICC Exhibit 15).

> Government for the use and benefit of the said Indians, with the consent of the Indians entitled thereto first had and obtained, but in no wise shall the said Indians, or any of them, be entitled to sell or otherwise alienate any of the lands allotted to them as reserves.[20]

The treaty commitments regarding agricultural assistance were also very specific:

> It is further agreed between Her Majesty and the said Indians that the following articles shall be supplied to any band thereof who are now actually cultivating the soil, or who shall hereafter settle on their reserves and commence to break up the land, that is to say: two hoes, one spade, one scythe and one axe for every family so actually cultivating, and enough seed wheat, barley, oats and potatoes to plant such land as they have broken up; also one plough and two harrows for every ten families so cultivating as aforesaid, and also to each Chief for the use of his band as aforesaid, one yoke of oxen, one bull, four cows, a chest of ordinary carpenter's tools, five hand saws, five augers, one cross-cut saw, one pit-saw, the necessary files and one grindstone, all the aforesaid articles to be given, once and for all, for the encouragement of the practice of agriculture among the Indians.[21]

Many of the First Nations within the boundaries of Treaty 4 agreed to this document in 1874. It would be a full year, however, before Chief Ow-tah-pee-ka-kaw (The Key) brought his people within the treaty.

THE KEY BAND ADHESION TO TREATY 4

In the summer of 1875, the Government of Canada directed W.J. Christie and M.G. Dickieson to "obtain the adhesion of other bands which had not been present at Qu'Appelle the previous year."[22] Having taken adhesions at Fort Ellice, Qu'Appelle Lake, and Fort Pelly between August 19 and September 18, the Treaty Commissioners and their entourage arrived in Shoal River on

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[20] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), 6 (ICC Exhibit 15).

[21] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), 7 (ICC Exhibit 15).

[22] Alexander Morris, *Treaties of Canada with the Indians* (Toronto: Belfords Clark, 1880; Coles Reprint, 1971), 79 (ICC Document, p. 23).

September 22, 1875. Two days later, on September 24, Commissioners Christie and Dickieson took adhesions to Treaty 4 from the Cree and Saulteaux Indians inhabiting that area. The adhesion presented to the Indians stipulated that those signing agreed to accept "the several provisions, payments and reserves" of the treaty signed at Qu'Appelle in 1874. Signing on behalf of the 27 Saulteaux Indian families assembled for the occasion was Chief The Key.[23]

In their report to the Minister of the Interior, Treaty Commissioners Christie and Dickieson remarked that The Key Band was located to the "west side of the Woody River, which rises in the Porcupine Mountains and falls into the Swan Lake to the west of the Swan River,"and that they "[had] been settled there for quite some time, have ground under cultivation, and possess a number of cattle and horses." Speaking of the entire group taking adhesion at Shoal River (the Key and Keeseekoose Bands), Christie and Dickieson reported that "[b]oth these Bands have made considerable progress in farming, as is evinced by the number of cattle and horses owned by them, and are anxious to receive assistance."[24]

The Key Band Reserve Surveyed at Swan River in 1878

According to a report submitted in 1876 by Angus McKay, the Indian agent for Treaty 4, the Band under "Chief Oot-ap-ap-ehk-ah-he-kaw, Or, He Who Unlocks" comprised 34 families, residing along the south bank of the Woody River, in possession of "quite a number of cattle – a few horses and some small potato gardens."[25] The Band had probably been residing at this location for many years, and it is not surprising that the land was included in the list of proposed reserves given to surveyor

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[23] See W.J. Christie and M.G. Dickieson, Treaty Commissioners, to the Honorable Minister of the Interior [David Laird],October 7, 1876, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1876*, xxii (ICC Documents, pp. 55–63), and *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), 11–12 (ICC Exhibit 15). Although the Christie/Dickieson report gives the population of the Band as 127, a recapitulation of the numbers paid with The Key in 1876 shows a total of 132 paid. See "Payments to Indians at Fort Pelly and Shoal Lake," *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1876*, xxx (ICC Documents, p. 64).

[24] W.J. Christie and M.G. Dickieson, Treaty Commissioners, to the Honourable Minister of the Interior [David Laird], October 7, 1875, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1875* (ICC Documents, p. 60).

[25] A. McKay, Winnipeg, to Superintendent General of Indian Affairs (SGIA), October 14, 1876, National Archives of Canada (hereafter NA), RG 10, vol. 3642, file 7581 (ICC Documents, p. 80).

William Wagner in 1875. Specific instructions for surveying a reserve for The Key Band were not issued at that time, however, because Wagner had several other reserves to survey that season and would not be able to complete all the work.[26] As a result, The Key Band waited several more years before receiving reserve lands.

In the meantime, dissension concerning reserve selection emerged within several of the bands – including The Key Band – that were waiting for their reserves to be surveyed. By May 1877, however, Lieutenant Governor David Laird[27] had met with the bands and was able to report that most of the differences had been settled and the bands were ready to have their reserves surveyed.[28] With regard to The Key Band, Laird reported that its members no longer wished for a reserve to be located at their traditional settlement on the south bank of the Woody River, but had identified lands at a new location "on Swan River, about 15 miles above Swan Lake." In Laird's opinion, the location of the newly proposed reserve was ideal, being "about 20 miles from the telegraph line" and out of the way of incoming settlement. He therefore supported the Band's selection.[29]

In January 1878, Wagner was sent to the Swan River district to begin surveying The Key Band reserve. On inspecting the lands identified by the Band, he concluded that the tract was not appropriate for a reserve and persuaded the Indians to select higher ground farther up river, but still near enough to Swan Lake to access their fishing grounds. At this location, about 90 miles northeast of Fort Pelly, he surveyed a reserve of 31,300 acres:

> The Band of which The Key is Chief consists of Indians and Halfbreeds living on two separate localities near the entrance of the Swan River into the Swan Lake.

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[26] W.J. Christie to Minister of the Interior, October 7, 1875, NA, RG 10, vol. 3625, file 5489 (ICC Documents, pp. 14–15).

[27] David Laird was the Minister of the Interior/Superintendent General of Indian Affairs from 1873 to 1877. In 1877, David Mills replaced Laird as Minister of the Interior, though Laird retained the office of Lieutenant Governor of the North-West Territories.

[28] David Laird, Lieutenant Governor and Indian Superintendent, Swan River, to Minister of the Interior, May 9, 1877, NA, RG 10, vol. 3649, file 8187 (ICC Documents, pp. 83 and 86).

[29] David Laird, Lieutenant Governor and Indian Superintendent, Swan River, to Minister of the Interior, May 9, 1877, NA, RG 10, vol. 3649, file 8187 (ICC Documents, pp. 83 and 86).

> The land[s] around both of these settlements are very low and are regularly inundated every year with the exception of the rising grounds on which the houses are located. This was one of the reasons which induced the members of the Band to select a more high situated locality for their future abode. ...
>
> The land as a general rule is rough & very broken by many swamps with the exception of about 1000 acres at the South East corner, where the land can be brought under Class 2. This space is extensive enough for all their wants.
>
> The timber consists chiefly of Poplar with a fair sprinkling of Spruce. Around the hay marshes are willows ... .[30]

Wagner's optimism about the utility of this reserve soon proved to be incorrect.

The Reserve at Swan River

Although certain members of the Band had been settled there for some time, Chief The Key moved onto the reserve at Swan River in the spring of 1878. According to a report issued by Indian Agent Alan McDonald in November 1878, the Chief "had moved to the Reserve in the spring and has already built his dwelling storehouse and stables." Likewise, a "few of his followers had broken up land and are fully determined on making the Reserve their home."[31] In his report the following year McDonald was less specific, noting merely that several Chiefs – including The Key – had "established themselves on their reserves, and they, and the members of their bands, have commenced to cultivate the soil ... ."[32]

Despite evidence showing the Band's willingness to pursue farming and stock raising on its reserve at Swan River, certain unforeseen events in 1880 caused the Department of Indian Affairs to decide to relocate the reserve. Inspector T.P. Wadsworth's annual inspection in the spring of 1880 coincided with a period of significant flooding in the Swan River district. Wadsworth determined that such flooding would likely occur on a regular basis, and that the best course of action would be for the entire Band to relocate. His report to the Superintendent General stated:

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[30] William Wagner, Dominion Land Surveyor (DLS), "Field Notes of Survey of Indian Reserves Treaty No. 4, The Key's Band, Surveyed during January 1875," June 1878 (ICC Documents, pp. 87–90).

[31] Alan MacDonald, Indian Agent, to Superintendent General of Indian Affairs, November 24, 1878, Canada, Parliament, *Sessional Papers*, 1879, No. 7, "Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1878," 65–66 (ICC Documents, p. 99).

[32] Alan MacDonald, Indian Agent, to Superintendent General of Indian Affairs, November 2, 1879, Canada, Parliament, *Sessional Papers*, 1879, No. 7, "Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1879," 108–09 (ICC Documents, pp. 100–01).

> I found the Key located in a vast wooded marsh, and living miserably on a few turnips and a little fish. This reserve is useless, as the flies are so desperately hard on the cattle, and there is no farming land. The little patches they have are small islands in the morass. Efforts have been made by Agent Macdonald to move this reserve to the neighbourhood of Farm No. 2 [near Fort Pelly] but without avail; after a long conversation with the "Key," he has promised to meet me on October 26, at Farm No. 2 and give me his decision. I think he will move in early spring, and I have promised him part of [farming instructor] Johnston's Farm for one year to plant his seeds in. Key has seven Government cattle, and the band own 37 private cattle.[33]

As indicated in Wadsworth's inspection report, Chief The Key had been persuaded by Agent Alan MacDonald to inspect the lands along the Assiniboine River near Fort Pelly, Saskatchewan. According to the oral history of the Band, a scouting party was formed to travel to the Fort Pelly district, view the land there, and report back to the rest of the Band.[34] Although a record of events following this inspection is lacking, it is evident that, by the summer of 1882, a decision had been made to abandon the reserve along the Swan River.

The willingness to relocate along the Assiniboine in the Fort Pelly district, approximately 90 miles southwest of their traditional homeland, was not shared by all band members. In fact, a majority of Chief The Key's followers, under Headman John Beardie,[35] chose to remain within the Shoal River area.

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[33] T.P. Wadsworth, Inspector of Indian Agencies, to SGIA, September 27, 1881, excerpt included within the report of Sir John A. Macdonald, SGIA, in *Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1881*, xviii, xxxiv (ICC Documents, p. 104).

[34] An account of The Key Band's "Great Trek" – based on the oral accounts of The Key Band elders – is included in Harry B. Miller, *These Too Were Pioneers: The Story of the Key Indian Reserve No. 65 and the Centennial of the Church, 1884–1984* (Melville: Sask.: Seniors Consulting Service, 1984), 18.

[35] He is also referred to in some documents as "John Beardy," but will be referred to in this text as "Beardie."

The Creation of The Key Band Indian Reserve 65

The Department of Indian Affairs was made aware of the circumstances surrounding the split in The Key Band in August 1882, when Indian Agent H. Martineau reported an encounter he had had with the Shoal River group under Headman John Beardie. On information provided to him by Beardie, Martineau reported that "Chief 'La Clef' or 'The Key' with a few of his followers has abandoned his Reserve at Swan River, in hopes of getting another reserve at [Fort] Pelly or thereabout."[36] A report from Indian Agent L.W. Herchmer, dated October 10, 1882, indicates that the "new Reserve at Pelly" had been established by that time and that the Indians residing there were quite comfortable.[37] Although lands had been selected by Chief The Key and his followers, a survey had not yet been conducted.

On December 20, 1882, the Prime Minister and Superintendent General of Indian Affairs, Sir John A. Macdonald, requested a full review of the matter. In reply, E.T. Galt, the Assistant Indian Commissioner at Winnipeg, reported the following:

> In answer to your letter of the 20th ult, No. 4576 relative to the land on which the Indians of Chief Key's band have their improvements, I have the honor to state that the Reserve originally set apart for them, situate North East from Fort Pelly on the West Side of Swan River ... has been totally abandoned. Twelve of the families have taken up a location outside and a short distance to the West of the Hudson's Bay lands at Fort Pelly. It was to this point that the Indians were taken by the Agent, they have substantial improvements at this point. ...
>
> As settlers are coming in and settling rapidly in the neighbourhood of Fort Pelly it is desirable in order to prevent complications to have Kee-see-koos' Reserve surveyed (it adjoins that of Cote's) also that of The Key if the Department should think proper to grant them the land on which the twelve families have settled.[38]

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[36] H. Martineau, Indian Agent, to SGIA, August 21, 1882, Canada, Parliament, *Sessional Papers*, 1883, No. 5 (ICC Documents, p. 114). See also H. Martineau, Indian Agent, to James Graham, Indian Superintendent, Winnipeg, August 18, 1882, NA, RG 10, vol. 7770, file 21117-2 (ICC Documents, pp. 105–07).

[37] L.W. Herchmer to Indian Commissioner, October 10, 1882, NA, RG 10, vol. 7770, file 27117-2 (ICC Documents, p. 111).

[38] E.T. Galt, Assistant Indian Commissioner, to the Right Honorable Superintendent General of Indian Affairs, January 29, 1883, NA, RG 10, vol. 7770, file 21117-2 (ICC Documents, pp. 115–16).

In accordance with this request, Indian Commissioner Edgar Dewdney communicated with Lindsay Russell, the Deputy Minister of the Interior and Surveyor General of Canada, to request that a survey be made of the new lands occupied by The Key Band.[39] Approval was granted and, in the spring of 1883, A.W. Ponton, the Dominion Land Surveyor (DLS), began surveying a number of reserves in the Treaty 4 area. Reporting in July of that year, Ponton informed his superiors that his work on the surveys for Chiefs The Key and Keeseekoose near Fort Pelly would be postponed until the cold weather set in, as it would be easier to traverse the river front and swamp areas.[40] Notwithstanding this delay, the survey of The Key IR 65 was completed by the end of 1883, at which time survey plans were submitted to the Indian Commissioner at Regina.[41] The confirming Order in Council described the new reserve as follows:

> This reserve is situated on the left bank of the Assiniboine River, about two miles west of Fort Pelly, on the old cart trail to Touchwood Hills. ...
>
> This reserve is generally thickly wooded with poplar, balm of gilead and groves of spruce and tamarac. The soil is chiefly of a sandy loam, the stretches of prairie in the vicinity of the reserve being of superior quality. There are extensive hay swamps in the north-east and south east corners of the reserve.[42]

As surveyed, the reserve fulfilled treaty land entitlement for 190 people (190 x 128 acres per person = 24,320 acres), even though only 83 band members – including the Chief and three headmen – resided there at the time. The size of the new reserve was based on the assumption of the Department of Indian Affairs that the Band would remain intact, residing together at one location.[43] As a result, the department initially refused to grant a reserve to the Shoal River faction in the belief that it would eventually join The Key at Fort Pelly. IR 65 was subsequently confirmed by Order in Council PC 1151 dated May 17, 1889, and withdrawn from the operation of the *Dominion Lands Act* by Order in Council dated June 12, 1893.[44]

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[39] E. Dewdney, Indian Commissioner, to L. Russell, Deputy Minister of the Interior, March 19, 1883, NA, RG 10, vol. 7770, file 21117-2 (ICC Documents, pp. 105–07).

[40] A.W. Ponton, DLS, to Edgar Dewdney, Indian Commissioner, July 13, 1883, NA, RG 10, vol. 7770, file 21117-2 (ICC Documents, pp. 121–24).

[41] See Edgar Dewdney, Indian Commissioner, to SGIA, December 14, 1883, NA, RG 10, vol. 7770, file 21117-2 (ICC Documents, pp. 125–26).

[42] Order in Council PC 1151, May 17, 1889 (ICC Documents, p. 194).

[43] See L.W. Herchmer, Indian Agent, to the Indian Commissioner, October 10, 1882, NA, RG 10, vol. 7770, file 27117-2 (ICC Documents, p. 111); L.W. Herchmer, Indian Agent, to the Indian Commissioner, March 16, 1884, NA, RG 10, vol. 7770, file 27117-2 (ICC Documents, pp. 133–35); and T.P. Wadsworth, Inspector of Indian Agencies, to SGIA, September 17, 1884, in *Annual Report of the Department of Indian Affairs for the Year Ended*

THE SHOAL RIVER FACTION AFTER 1881

As we have seen, at 24,320 acres, the original Key Band IR 65 fulfilled treaty land entitlement for 190 people, although only 83 band members lived at the Fort Pelly location.[45] The majority of band members opted to remain in their traditional homeland near Swan River, Manitoba. The position of these people was explained in 1882 by Headman John Beardie:

> We the undersigned want a Reserve to live on at Shoal Lake. We were told and we still hear that all Indians get a Reserve where they were brought up and this is our reason for wishing a Reserve here as we don't wish to leave our birth place.
>
> Further we wish it known that we never said or promised to go to Pelly, the Chief "Key" left our late Reserve without our consent so he can have a reserve at Pelly, but as for us we don't wish or intend to follow him there, therefore we wish you as agent to lay our case before the Gov't.[46]

The followers of John Beardie reiterated their opposition to the relocation plan in 1884:

> We belonged formerly to Chief Key's Band numbering altogether thirty seven heads of families. Our Agent had a Reserve given us on the banks of the little Swan River, as you will see on the Map showing the Indian Reservations. During the year of exceptional high water, our Reserve was somewhat flooded, and became unfit for culture: at present the same Reserve is perfectly dry and the soil good; large potatoes

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December 31, 1884, 93–94 (ICC Documents, pp. 131–32).

[44] Order in Council PC 1694, June 12, 1893 (ICC Documents, pp. 272–74).

[45] T.P. Wadsworth, Inspector of Indian Agencies, Department of Indian Affairs, Edmonton, to Superintendent General of Indian Affairs, September 17, 1884, in Canada, Parliament, *Sessional Papers*, 1885, No. 3, "Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1884," 93 (ICC Documents, p. 137).

[46] John Beardie, Headman, to Indian Agent, Treaty No. 4, August 26, 1882, NA, RG 10, vol. 7770, file 27117-2 (ICC Documents, pp. 109–10).

> and other vegetables have been raised there in previous years with great success. Unfortunately, for us, our Agents paid us a visit during the high water and as they had a rough time coming through, formed their opinion of our Reserve accordingly. They told us that it would be impossible for us to subsist on our Reserve, as nothing would grow, and besides that the roads were too bad for bringing in supplies, &c, &c. After some hesitation they at length prevailed on our Chief, with twelve followers to go up to Fort Pelly and have a Reserve there. A third of those who went up were halfbreed Indians who could work [2 words unreadable] &c. *We the majority (of twelve) numbering twenty-four heads of families refused to go and further informed our agent not to include us in the surveying of the Reserve at Pelly as we intended to remain down here. Since then we have been asking for a Reserve to be given us here, but so far we have had not even the satisfaction of a reply.*
>
> The place we have now selected for a Reserve is at the mouth of Shoal River where we have every advantage. The place affords good Fishing all the year through the land is high and good, Timber plentiful, suitable for all our purpose [sic] – and our hunting grounds are near. The facilities for receiving supplies &c are advantageous, as we have water communication from here to the Railroad station at Westbourne, eighteen miles from Portage la Prairie. Mr. Indian Agent Martineau's supervision extends fifty miles from here, that is the Reserve at Duck Bay on the same lake as we are situated ... .
>
> We therefore request You to have a Reservation laid out for us as early as possible, at the desired point. We have already lost so much time in awaiting replies &c [sic]; that we intend to begin working this coming spring. With your order seed could as yet be given us, in time for spring use, but of course, no time should be lost.[47]

Initial plans to allow a reserve at Shoal River were cancelled by the department, however, because the land was deemed unsuitable for agriculture. According to Indian Agent L.W. Herchmer in his 1885 report, "there is no use giving a Reserve at Shoal River as there is no land fit to work in that vicinity, and it will never be required for White Settlement, consequently, as long as these Indians choose to live by fishing they could remain at Shoal River, and when desirous of becoming civilized they could join their Reserve at Pelly."[48]

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[47] John Beardie et al., Shoal River, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, January 1, 1884, NA, RG 10, vol. 7770, file 27117-2 (ICC Documents, p. 129). Emphasis added.

[48] L.W. Herchmer, Indian Agent, to Indian Commissioner, Department of Indian Affairs, May 6, 1885, NA, RG 10, vol. 3575, file 215 (ICC Documents, pp. 142-45).

In Herchmer's view, it was merely a matter of time before the entire Band became settled on IR 65 at Fort Pelly.[49] He was wrong. Although they had no reserve, the Shoal River people remained where they were, and there is no evidence in the documents assembled for this inquiry that any of them relocated to the Fort Pelly reserve. In fact, there is evidence showing that those members remaining at Shoal River eventually thrived by hunting, fishing, and raising cattle.[50] Furthermore, in February 1885, the members of the Shoal River faction appeared to repudiate the leadership of Chief The Key, as well as any interest in IR 65, in a letter to Inspector E. McColl that echoes their letter of the previous year to Deputy Superintendent General Vankoughnet:

> We belonged formerly to the Keys band, numbering altogether nineteen heads of families. A Reserve was given us on the banks of the Swan River. Unfortunately during the exceptional high waters the Reserve was flooded, and unfit for culture. At present the same Reserve is high and dry and the soil good. ... During the high waters our agents paid us a visit, and as they had a rough time coming through, they formed their opinions accordingly, And told us it would be impossible for us to live there, as nothing would grow. ... They at length persuaded our Chief "The Key" together with twelve followers to go up to Pelly, and have a Reserve surveyed for them there. We the majority having nineteen heads of families refused. We told our agent not to have our names included in the surveying of the Reserve, as we were going to remain here, probably our names may have been included, but that is not our fault ...[51]

In 1888, J.A. Markle, the agent for the neighbouring Birtle Agency, paid treaty annuities to the Shoal River people at the site where they had built their homes, and submitted the following report:

> I visited that portion of the "Keys" Band residing at Shoal River, and as you are aware, these Indians have for some years offered opposition to be removed to the Reserve set apart for them near Fort Pelly and have asked that one be given them on the Shoal River, a report of my visit, and an opinion as to whether it would be advisable to meet their wish, may not be out of place. ...

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[49] L.W. Herchmer, Indian Agent, to Indian Commissioner, Department of Indian Affairs, May 6, 1885, NA, RG 10, vol. 3575, file 215 (ICC Documents, p. 143).

[50] W.E. Jones, Acting Indian Agent, to Indian Commissioner, Department of Indian Affairs, November 3, 1888 (ICC Documents, p. 159).

[51] John Beardie, Headman "for the Band," to E. McColl, February 20, 1885, NA, RG 10, vol. 3575, file 215 (ICC Documents, pp. 138–41).

> I found all to be well clothed, in good health, and their only trouble seemed to be that the Department would insist on their removing to the Reserve near Fort Pelly. They informed me that for ten months of each year they are able to take all the fish they can possibly use, and no one need be in want the other two months if they only dry sufficient fish for that time.
>
> Ducks are also plentiful during the summer, and as this is a good fur bearing part of the country, they had sold during the past year fur to the value of $5000.00 and as near as I could learn had earned fully $1000 more in other work. There has only been one death in the past year. I am of the opinion it would be a mistake to remove these Indians to the Reserve near Pelly even providing they were willing to come, and if it were done they would have to be fed at least ½ of the year and I am of the opinion that, if another good place can be found in that district, where fish is easily taken, it would be to the best interest of the Indians and Department to set apart another Reserve and allow any who are now on the Reserve near Fort Pelly to remove to it if they so wish, as I believe the Indians who have Reserves similarly situated are in a much better position than those who have Reserves inland.[52]

Reserves 65A to 65E in and around Shoal Lake and Dawson Bay

The department apparently heeded Markle's advice, and over the succeeding years established a number of small reserves for the use of the people at Shoal River. In September 1889, J.C. Nelson surveyed a one-square-mile fishing station at the north end of Shoal River on Dawson's Bay.[53] Nelson's survey plan No. 218 indicated that the reserve – Dawson Bay IR 65A – was intended to be a fishing station for the "Indians of the Pelly Agency." The reserve was confirmed by Order in Council on August 5, 1930, and set apart merely for "use of the Indians."[54] In 1889, a small plot (5.6 acres) within this area was occupied as a trading post by a squatter named Hartman, but was later abandoned by him. Nelson surveyed the "Hartman Claim" in 1893 and it was confirmed by Order in Council PC 1216 on July 11, 1895, as an addition to IR 65A.[55]

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[52] J.A. Markle, Indian Agent, Department of Indian Affairs, to Indian Commissioner, Department of Indian Affairs, September 5, 1888, NA, RG 10, vol. 3805, file 51162 (ICC Documents, p. 147).

[53] W. Austin, Department of Indian Affairs, to Deputy Superintendent General of Indian Affairs, December 29, 1890, NA, RG 10, vol. 3807, file 52936 (ICC Documents, p. 245).

[54] Jim Gallo, excerpt from "TLE Report – Shoal River," 1980 (ICC Documents, p. 644).

[55] John C. Nelson, In Charge Indian Reserve Surveys, to Superintendent General of Indian Affairs, December 16, 1893, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1894* (ICC Documents, pp. 267–68); G.A. Poupore, Director, Lands and Membership, Department of Indian Affairs, to W.V.

In December 1893, Nelson surveyed several "new reserves" at Swan Lake and Dawson's Bay. These reserves were

> Dawson's Bay IR 65B, containing 2,272 acres
> Swan Lake IR 65C, containing 1,939 acres
> Dog Island IR 65D, containing 275 acres
> Dawson Bay IR 65E, containing 53.40 acres.[56]

Nelson considered that all the reserves belonged to The Key Band:

> The reserve now consists of one larger and six smaller portions of land. The principal part is situated at Pelly and was surveyed by Mr. A.W. Ponton, DLS in the year 1883. The other parts surveyed this season, as situated at the north-westerly end of Lake Winnipegosis, with the exception of a small area at the mouth of Birch River on the westerly shore already mentioned of Swan Lake ...[57]

The Orders in Council confirming these reserves were issued in 1895. Those for IR 65B and 65D specify that the lands were set apart for the "Band of Chief The Key."[58] IR 65C was "set apart and reserved for the purpose of an Indian Reserve,"[59] and IR 65E was set aside for the "Indians of Treaty No. 4."[60] After 1895, the annual reports for the Pelly Agency indicate that both locations maintained schools and that the Church of England had established missions that were well attended.[61]

Lowry, Assistant Regional Director, Lands, Membership and Estates, Indian and Eskimo Affairs, May 27, 1976 (ICC Documents, p. 638); Jim Gallo, excerpt from "TLE Report – Shoal River," 1980 (ICC Documents, p. 644).

[56] W.V. Lowry, Assistant Regional Director, Lands, Membership and Estates, Indian and Eskimo Affairs, to R.W. Winstone, Chief, Crown Lands, Department of Renewable Resources and Transportation Services, Winnipeg, Manitoba, June 17, 1977 (ICC Documents, p. 642).

[57] John C. Nelson, In Charge Indian Reserve Surveys, to Superintendent General of Indian Affairs, December 16, 1893, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1894* (ICC Documents, pp. 267–68).

[58] Order in Council, July 20, 1895, NA, RG 10, vol. 3575, file 215 (ICC Documents, p. 278) [note: OC refers to this reserve as 65d in error]; Order in Council, September 20, 1895, NA, RG 10, vol. 3575, file 215 (ICC Documents, p. 282).

[59] Order in Council, July 13, 1895, NA, RG 10, vol. 3575, file 215 (ICC Documents, p. 275).

[60] Jim Gallo, excerpt from "TLE Report – Shoal River," 1980 (ICC Documents, p. 644).

[61] W.E. Jones, Indian Agent, Department of Indian Affairs, to Superintendent General of Indian Affairs, August 5, 1895, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1896* (ICC Documents, pp. 279–80); W.E. Jones, Indian Agent, Department of Indian Affairs, to Superintendent General of Indian Affairs,

Separate Annuity Paylist for the Shoal River "Band" in 1902

Up to and including the 1901 annuity payments, both portions of The Key Band were listed together on one annuity paylist, which required that the members of the Shoal River faction travel to Pelly for their payments. In 1885, these individuals had complained about this routine, calling it "very hard treatment."[62] It appears that the only exception to this practice occurred in 1888, when Agent Markle paid the Shoal River people in their community. In 1902, however, the two groups were shown on separate paylists, and the administration of the Shoal River people was transferred to a different agency. Indian Agent R.S. McKenzie wrote:

> The supervision of that portion of Key's band residing at Shoal River has been transferred to the Lake Manitoba Inspectorate as it was impossible to give them the necessary attention owing to the condition of the trails and the distance [from the Agency headquarters].[63]

The heading of the 1902 paylists for the Shoal River reads: "Shoal River Band paid at Shoal River Reserve, August 18, 1902." John Beardie was paid as headman.[64]

The historical records of the department do not specifically address the issue of the designation of Shoal River as a separate band, although Inspector Graham apparently believed that such an action would require a "departmental order."[65] In 1977, W.V. Lowry, the department's Assistant Regional Director of Lands, Membership and Estates, reported that, "[a]lthough the Shoal

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August 9, 1898, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1899* (ICC Documents, pp. 291–92); W.E. Jones, Indian Agent, Department of Indian Affairs, to Superintendent General of Indian Affairs, August 30, 1899, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1899* (ICC Documents, pp. 300–01).

[62] John Beardie, Headman [and one other] "for the Band," to E. McColl, February 20, 1885, NA, RG 10, vol. 3573, file 215 (ICC Documents, pp. 138–41).

[63] R.S. McKenzie, Indian Agent, Department of Indian Affairs, to Superintendent General of Indian Affairs, July 14, 1902, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902*, 160 (ICC Documents, p. 326).

[64] Department of Indian Affairs, Annuity paylist, August 8, 1902, DIAND, Genealogical Unit (ICC Documents, pp. 329–36).

[65] W.M. Graham to Secretary, Department of Indian Affairs, August 13, 1908, NA, RG 10, vol. 4039, file 329759 (ICC Documents, pp. 455–56).

River Band was paid with The Key Band until 1902, the two bands are now recognized as separate groups."[66]

No evidence was produced to show that the two Bands ever authorized any distribution of the reserve land between them. In 1924, however, the Shoal River Band, "resident on our Reserve No. 65a," surrendered IR 65D and IR 65E in exchange for additions to IR 65A and IR 65B and a new reserve, IR 65F.[67] The Orders in Council confirming the additions and new reserve stated that the lands were "set apart for the use of the Indians" and did not mention a particular band by name.[68]

LIFE ON THE KEY BAND INDIAN RESERVE 65 BEFORE 1909

As discussed above, The Key Band had resided at Shoal River for many years before relocating to the Fort Pelly district. The historical record shows that, at the time they entered Treaty 4 in 1875, band members "had ground under cultivation, and possess[ed] a number of cattle and horses."[69] The agricultural and ranching progress the Band had made to this date was a product of its own efforts. One of the basic terms of Treaty 4, however, provided that bands would receive agricultural implements, seed, and certain livestock to assist them in their transition to farming and stock raising. This issue was addressed by the Treaty Commissioners in their report on the adhesion of the Indians at Shoal River:

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[66] W.V. Lowry, Assistant Regional Director, Lands, Membership and Estates, Indian and Eskimo Affairs, to R.W. Winstone, Chief, Crown Lands, Department of Renewable Resources and Transportation Services, Winnipeg, Manitoba, June 17, 1977 (ICC Documents, p. 642).

[67] Surrender Instrument and related documents, June 2, 1924 (ICC Documents, pp. 546–51); Orders in Council, PC 1364, June 14, 1930 (ICC Documents, pp. 567–71).

[68] Orders in Council, PC 1364, June 14, 1930 (ICC Documents, pp. 567–71). Physically, members of the Shoal River Band were located in two separate communities, about 70 miles apart. Discussions proposing a division of the Band "to improve band administration and in order to have a council more attuned to the local needs and desires of the individual communities" began about 1977. In 1982, the Minister of Indian Affairs approved the division assented to in a plebiscite by a majority of the two groups. Two bands were created, Shoal River and Indian Birch. The reserves were divided between them: Shoal River Band received IR 65A, B, and F; and the Indian Birch Band received Swan Lake Reserve 65C.

[69] W. Christie and M.G. Dickason, Treaty Commissioners, to the Minister of the Interior, October 7, 1875, NA, RG 10, vol. 3625, file 5489 (ICC Documents, pp. 7–21).

> No agricultural implements have been forwarded to Shoal River, and as these bands, as before stated, manifest a great desire to cultivate the soil, every encouragement and assistance should be given them, and to this end we would recommend that arrangements be made to forward the agricultural implements and carpenters tools as well as seed grain and potatoes as early as possible next spring ... .[70]

The location of the original reserve held by The Key Band did not lend itself to successful agriculture, despite the Band's "desire to cultivate the land." The location of this reserve was described as "poor farming country" by Indian Agent A. McKay,[71] and the quality of the land was one of the determining factors that persuaded a portion of the original Band to relocate to the Fort Pelly district in 1882. On establishing themselves on their new reserve near Fort Pelly, the members of The Key Band set about constructing the infrastructure of their new community. Houses were erected by the summer of 1883, and plans soon followed for the construction of a day school and church.[72] The Band's attempts at farming, although slow, were also encouraging. For example, in 1883 the agent at Birtle noted that the Band had "done fairly well, have neat houses and small fields, but being totally ignorant of farming and unable to plow, advance slowly." In order to assist them, he "engaged a competent half-breed to instruct them in plowing for two months" and "lent this band cattle." In his opinion, the Band "appear[ed] anxious to improve."[73] Indeed, by the following summer some improvement had been noted. In 1884, T.W. Wadsworth, the Inspector of Indian Agencies, submitted the following report with regard to his inspection of IR 65:

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[70] W. Christie and M.G. Dickason, Treaty Commissioners, to the Minister of the Interior, October 7, 1875, NA, RG 10, vol. 3625, file 5489 (ICC Documents, pp. 7–21).

[71] A. McKay, Indian Agent, to SGIA, October 11, 1876, NA, RG 10, vol. 3642, file 7581 (ICC Documents, pp. 47–52).

[72] See Rev. Harry B. Miller, *These Too Were Pioneers: The Story of the Key Indian Reserve No. 65 and the Centennial of the Church, 1884–1994* (Melville, Sask.: Seniors Consulting Service, 1984), 24–25 (ICC Exhibit 6), and T.P. Wadsworth, Inspector of Indian Agencies, to SGIA, September 17, 1884, in *Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1884*, 93 (ICC Documents, p. 137).

[73] Canada, Parliament, *Sessional Papers*, 1884, No. 4, 63, as quoted in Rev. Harry B. Miller, *These Too Were Pioneers: The Story of The Key Indian Reserve No. 65 and the Centennial of the Church, 1884–1994* (Melville: Sask.: Seniors Consulting Service, 1984), 24 (ICC, Exhibit 6).

> These Indians are doing very well, having this year fifty acres in crop, twenty of wheat, twelve of potatoes, sixteen of barley and two acres of garden, as against fourteen acres all told in 1883, and their cattle have increased from thirty-nine head, in 1883, to forty-seven head this year, with more calves to come. The chief asks to use his oxen in freighting when they are not required for farming. ... They asked for a mower, fanning mills, sickles, milk pans, two churns, six breaking ploughs, two iron harrows and two wagons. The chief wants two iron-bound carts in lieu of a light wagon, and two sets [of] pony plough harness [sic] for the use of the band; he also asked for clothing. At each house can be seen a saw pit, the Indians having whip saws of their own.[74]

The Band's initial progress in agriculture, however, began to decline towards the end of the decade, after the department removed the full-time farming instructor from the Pelly district. According to Indian Commissioner Hayter Reed's 1888 inspection report of all three reserves in the Fort Pelly district (The Key, Keeseekoose, and Cote), the crops raised by the Bands were "of small value, and they have been deprived of the benefit of the vegetables, which I observed had, in the absence of White supervision, been allowed to be choked out by weeds."[75] The Band's lack of progress was compounded, according to Reed, by a serious local decline in small game and fur-bearing animals. As a result, he sent W.E. Jones, one of his subordinates employed at the Touchwood Hills Agency, to spend "a month or so on the spot and make such investigations as will enable us to reach a just conclusion as to the actually existing condition of things, and the prospects." Reed stated that, although it was apparent that some action was required to remedy the above situation, he would await Jones's report before initiating any administrative changes.[76]

On October 7, 1888, W.E. Jones arrived in Fort Pelly and conducted a house-by-house inspection of the three reserves located there. His extensive observations concerning The Key Band at Fort Pelly reveal the degree of decline in the community:

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[74] T.P. Wadsworth, Inspector of Indian Agencies, to SGIA, September 17, 1884, in *Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1884*, 93 (ICC Documents, p. 137).

[75] Hayter Reed, Indian Commissioner, to Edgar Dewdney, SGIA, September 6, 1888, NA, RG 10, vol. 3805, file 51162 (ICC Documents, pp. 149–56).

[76] Hayter Reed, Indian Commissioner, to Edgar Dewdney, SGIA, September 6, 1888, NA, RG 10, vol. 3805, file 51162 (ICC Documents, pp. 149–56).

> I visited the Keys reserve here, this Band is considerably divided up, only a part of them residing on their reserve, these have done but little in the shape of farming, and I am sorry to say what crop they had was frozen, many of these people are far from being healthy, being afflicted with scrofula. ...
>
> These people come from the Shoal River, where fish was plentiful. They have had no chance to learn anything of the usage of implements for farming: in my opinion it was a great mistake that these Indians were removed from Shoal River and placed on their present reserve. I am sure you were not advised fully in the matter.
>
> Their argument is this, you (the Department) asked us to go to Fort Pelly on a reserve there, and you would help us. We have done so, we knew nothing of farming, and you sent no one to help us. We did the best we could ourselves and it has failed, we have nothing and we want you to help us by giving work to those who can work, and relief to others.
>
> The other part of the Keys band are all Swampy Crees, and are living at the north mouth of Shoal River. They were born and brought up there. I visited these Indians, a distance of 90 miles. They are totally ignorant of any other means of earning a living, except by fishing and hunting: their chief food is fish, this they think they must have. When it was suggested to Chief Key and his band that they remove to Fort Pelly, these Indians some 19 families, the majority of the Band said they would not go, for the reasons that they were better off where they were, and warned the Chief not to take up land on their account. On their not going up to the Reserve, all their cattle and implements were taken from them. A year after John Beardy, H.M. [Headman] began a correspondence with the Supt. General as to their troubles. This continued through 1884 & 5 when they were told to take the correspondence and go to Regina.
>
> These people have not received any relief from the Department. They have done for themselves, and have quite a number of cattle, if they had been removed here, they would have had to have been fed, or else return to where they are; in my opinion they have shown good sense in their actions, also save the Dept. a lot of money and trouble. I would recommend that they be allowed to remain where they are for some time yet until we have more land prepared on their Reserve, and are sure we can raise crops there. They want secured a small portion of land for a fishing station, at the north mouth of Shoal River.
>
> This could be a fishing station for all Fort Pelly Indians in the future. ...
>
> On Cotes Reserve a large quantity of hay can be cut possibly 6 or 700 tons, and about 4 or 500 tons on Kee-see-koose, but little can be got on the Keys, so if cattle can be provided for these people, and if it is closely attended to, hay can be secured for them. Oxen will be required for next springs work.[77]

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[77] W.E. Jones to Hayter Reed, Indian Commissioner, November 3, 1888 (ICC Documents, pp. 158–60).

As a result of the above inspection, the department authorized Jones to continue on in the Pelly district on an experimental basis until it could be determined whether his presence there had a beneficial effect on the progress of the three Bands.[78] In the spring of 1889, he submitted his first report as acting agent. He reported that the Bands had "done a lot of work during the winter, hauling in their hay from where it was cut, getting out rails and logs, also some of them sawing quite a lot of lumber," but that the hunters "had a miserable catch" and would not be able to reduce the debts they had contracted in the fall. Therefore, Jones recommended "a further provision for these Indians here, to carry them through the fiscal year."[79] His Annual Report submitted later the same year was marginally more encouraging. While progress in the area of gardening had enabled the bands to support themselves reasonably well during the summer months, the hunt had been poor and many of the animals they usually hunted had disappeared.[80] In general, the Bands did not yet appear to have recovered from earlier setbacks and were making slow progress in the transition to full-time farming.

Concerned that the Pelly Agency Bands would lose interest in the pursuit of farming and stock raising, Assistant Indian Commissioner A.E. Forget recommended that a communal hay reserve be established for the exclusive use of the three Pelly Bands, The Key, Cote, and Keeseekoose. After being approved by senior officials within the Department of Indian Affairs, the request was forwarded to the Department of the Interior for approval, and confirmation was received in May 1890. Approximately 20.5 square miles of land were thereby established as a hay reserve for the Indians of the Pelly Agency.[81]

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[78] Hayter Reed, Indian Commissioner, to DSGIA, June 12, 1890 (ICC Documents, p. 225).

[79] W.E. Jones, Acting Indian Agent, to Hayter Reed, Indian Commissioner, April 20, 1889 (ICC Documents, pp. 176–78).

[80] W.E. Jones, Acting Indian Agent, to SGIA, August 29, 1889, in *Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1889*, 63 (ICC Exhibit 7, vol. 3).

[81] For further information about the creation and extinguishment of the "Pelly Haylands" reserve, see A.W. Ponton, DLS, to the Secretary, DIA, December 28, 1898 (ICC Documents, pp. 295–97); Order in Council dated March 15, 1899 (ICC Documents, p. 298); F. Pedley, DSGIA, to P.G. Keyes, Secretary, Department of the Interior, February 21, 1903 (ICC Documents, p. 350); F. Pedley, DSGIA, to H.A. Carruthers, Indian Agent, October 22, 1903 (ICC Documents, p. 353); and D. Laird, Indian Commissioner, to F. Pedley, DSGIA, December 26, 1905 (ICC Exhibit 16).

It appears that, after 1889, all three Bands in the Pelly Agency made notable progress towards the department's goal of promoting community self-sufficiency.[82] By the summer of 1890, despite having suffered through a few poor seasons during the 1880s, the members of The Key Band had established a reputation with Inspector Wadsworth as intelligent, self-sufficient people. After Wadsworth inspected the reserve during the summer of 1890, he was cautiously optimistic:

> Key Reserve. The Chief of this Band came from Shoal River, Lake Winnipegosis several years ago, bringing with him only a portion of his Band, they now number sixty eight souls, eleven heads of families. Those still remaining at Shoal River number one hundred and fifty-souls.
>
> This Chief, together with his two brothers, are hunters and beyond growing a few potatoes, give but little attention to farming. However, up to the present time, they have lived comfortably and required but little assistance from the Agent. The other families were originally boat builders and voyageurs; they are intelligent, handy men, and take great interest in farming and cattle raising. They have comfortable houses, good stables, corrals, stock yards, root houses, milk houses etc. Their acreage in crops this year was not large (25). Their potatoes, onions and turnips are a magnificent crop but their grain is a failure on account of the frost. The land of the Reserve where they have settled is light sandy soil, but with Fall plowing, early sowing and copious spring rains, should produce good crops.
>
> Cattle – They have seventy five head of cattle from sixteen cows they have this year reared fifteen calves. I saw most of the cattle, they are in excellent condition, the cows are milked and the calves fed. Butter is made. The calves are in enclosed fields with access to water.
>
> These people have considerable private farming property namely twelve horses, four cows, five young cattle, two mowers, two wagons, one cart, two bobsleighs, three buckboards. They work four [illegible] horses at farm work, they have also a good deal of poultry, apparently insignificant in value but they are an important addition to their resources, eggs being always saleable at good prices.[83]

Statistics compiled from the Annual Report for that year show that the Band also owned 13 oxen and 12 horses, together with 17 houses and 14 stables.[84] The figures listed in the Annual Report also reveal that the Band planted a total of 26 acres in various crops, with varying degrees of success. For instance, band member John Redlake planted 2.5 acres of wheat that was destroyed, likely by early frost.[85] The Band, however, had more success growing hardy crops such as oats, barley, potatoes, and turnips, and managed to harvest 88 bushels of oats on 6 acres, 90 bushels of barley on 8.5 acres, 267 bushels of potatoes on 4.5 acres, and 193 bushels of turnips on 4 acres.[86]

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[82] For a complete analysis of contemporary DIA policy with regard to Indian reserve farming and stock raising, see Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen's University Press, 1991).

[83] T.P. Wadsworth, Inspector of Indian Agencies, to SGIA, October 6, 1890, NA, RG 10, vol. 5844, file 73400 (ICC Documents, pp. 228–37).

[84] See "Approximate Return of Grain and Roots Sown and Harvested, Fort Pelly," in *Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1890*, 258–59 (ICC Exhibit 7, vol. 3).

From these statistics, it can be determined that each male head of family, even those categorized as "hunters," made an effort to put some crop in the ground. The degree of success attained by the various members varied a great deal. On the whole, however, it is not surprising that Wadsworth would have concluded that "they have lived comfortably and required but little assistance from the Agent." Together, the Inspector's report and statistics depict a group that had sustained a measurable degree of success in their effort towards adaptation of an agricultural lifestyle.

The situation was much the same in 1895, the last year in which the Department of Indian Affairs collected and published crop production statistics for individual bands.[87] A review of those statistics reveals that The Key Band members had maintained similar production levels to those attained in 1890, with the exception of decreases in wheat and turnip yields. In all other measured categories, the Band had increased its crop production from the levels reported in 1890. For example, 250 bushels of oats were produced from 12.5 acres, 155 bushels of barley were produced from 7.75 acres, and 460 bushels of potatoes were harvested from 5.75 acres.[88] Furthermore, the Band increased the number of acres planted within its communal garden. Finally, the statistics show that

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[85] See "Return Showing Crops Sown and Harvested by Individual Indians in Pelly Agency, Season of 1890," in *Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1890*, 270–71(ICC Exhibit 7, vol. 3).

[86] See "Return Showing Crops Sown and Harvested by Individual Indians in Pelly Agency, Season of 1890," in *Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1890*, 270–71(ICC Exhibit 7, vol. 3).

[87] After 1895, the Annual Reports of the Department of Indian Affairs produced statistics only at the agency level. Because these figures included all bands in a given agency, they do not, unfortunately, lend themselves easily to the assessment of individual bands.

[88] See "Return Showing Crops Sown and Harvested by Individual Indians in Pelly Agency, Season of 1895," in *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1895*, 430 (ICC Exhibit 7, vol. 3).

770 tons of hay were harvested from the various hay swamps on the reserve.[89] Wadsworth's inspection report for the year in question adds further detail:

> Key Band: Six Indians of this band are farmers, namely; William Brass, George Brass, Thomas Brass, John Redlake, William Brass, Jr., Chief Key and his two brothers. Very few, if any, of the halfbreeds of this country have as good home surroundings as the first five men named. Their houses are excellent buildings, are partitioned and have also sleeping apartments upstairs.
>
> The farmers of this band occupy eleven houses and fifteen stables. They have ten work oxen, one hundred and eighteen cows and young cattle, twenty-two horses, seventy fowls, five farm wagons, two mowers, two horse rakes and have already ten acres in grain sown.
>
> Wm. Brass, Sr's. family are great butter makers and raise turkeys as well as other poultry. This band has also the use, on loan, in addition to the above mentioned private property, of two mowers, two horse rakes and two farm wagons. For Indians they have not many horses, but those they have are of superior breed.
>
> The large portion of this band who live at Shoal Lake are reported as a very good lot of Indians. They number nearly one hundred and sixty souls. Last year they raised sufficient potatoes for use and seed, and one man this spring had eighty bushels to sell. Their principal subsistence is from fishing and hunting.

Reporting on the entire agency, Wadsworth continued:

> Live Stock: I rounded up the cattle at the different Indian farms, and I assured myself of the reasonable correctness of the live stock registers, from which the quarterly returns are made up.
>
> The animals are in good condition, better than I have ever seen them so early in the spring in this part of the country.
>
> There are already a good number of spring calves. The spring being so favourable, I thought it a pity there were not more. At every farm there was hay on hand and to spare. The stables were in good repair, and there were a few young bulls which had not been castrated last fall, but while I was there the oversight was being rectified ...
>
> I feel warranted in stating that every stable is fitted with stanchions and that every animal is legibly branded "ID." I say this from the fact that of all the stables I entered, I found them fitted up as stated, and I do not recall observing one animal without the brand. I attribute this favourable state of affairs to the indefatigable

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[89] See "Return Showing Crops Sown and Harvested by Individual Indians in Pelly Agency, Season of 1895," in *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1895*, 430 (ICC Exhibit 7, vol. 3).

> persistence of the agent, who never allows an Indian to rest in peace until a thing is done that has to be done; and as they are becoming forehanded in their work, they appear to be satisfied and contented with their situation. ...[90]

Taken together, the Inspector's report and statistics reveal that the Band was increasing its efforts to raise crops in 1895. It is more difficult, however, to quantify the Band's success in stock raising that year, given that both Wadsworth and, in the following report, Agent Jones limited their comments to the significant increase in the agency as a whole:

> The earnings of the Indians have increased over those of last year, and the Indians have the will to do more if they had the opportunity, but all such resources as the selling of hay or wood (a small quantity has been sold to the school) is cut off, as we are fifty miles from the towns and settlements. ...
>
> Their stock consists of one hundred and forty-three horses, thirteen bulls, one hundred and sixteen oxen, two hundred and ninety-five cows, one hundred and thirty-three steers, one hundred and fifteen heifers, one hundred and fifty-seven calves (up to 30th June), one hundred and forty-six sheep and lambs; total cattle, eight hundred and twenty-nine, also the sheep and horses above mentioned. This is the showing now of the property of the Indians here (one hundred and sixty head has been consumed, sold and died), as compared to two hundred and eighty head owned by them in the year 1889, an increase in a period of six years of seven hundred and ten head. The increase in value over last year of live stock held by Indians will amount to about $4,725.[91]

Nevertheless, Jones did confirm that some members of The Key Band shared in this success. With respect to William Brass Sr and family, Jones stated:

> William Brass, sr., in 1889 had five head of cattle; he now owns thirty-five head of cattle, six horses, two double wagons, mower and rake. Last year he sold and consumed six head of cattle. This Indian has a good house, always clean, a dairy house; his daughter, Susan, milking six cows, making butter and selling it to the

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[90] See *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1895*, 115–22 (ICC Exhibit 7, vol. 3).

[91] W.E. Jones, Indian Agent, Cote, Assiniboia, to SGIA, August 5, 1895, in *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1895*, 102–05 (ICC Exhibit 7, vol. 3).

> traders at Fort Pelly. They keep about thirty fowls and raise a number of turkeys every year.[92]

Jones also stated that John Redlake, George Brass, and Thomas Brass were "proportionately well off" in comparison with William Brass and other successful examples from the entire agency. In general, therefore, the department's Annual Report for 1895 suggests that the members of The Key Band were also sustaining their progress in stock raising.

Although statistical evidence for the years after 1896 is sparse, documentary evidence indicates that the Band maintained a slow but steady increase in agricultural production. In 1898, Inspector Alexander McGibbon reported that the Band had 22 acres under crop and had broken five additional acres of garden.[93] The same report stated that band members had 212 head of cattle, 25 horses, and nine sheep.[94] While the total acreage in crop during this year was marginally lower than had been the case during the previous decade, the figures for livestock and garden production reflect an increase and reveal that the Band was expanding in new directions such as sheep raising.

This pattern continued into the next century during the years immediately preceding the surrender. In 1903, for example, L.J.A. Leveque, the Inspector of Indian Agencies, submitted the following report regarding the Band's performance:

> Resources and Occupations.– The majority of this band make their living by hunting and freighting; only a few follow husbandry or cattle-raising for a living.
> Cattle.– All the stock inspected, numbering one hundred and twenty-one head. The property of seventeen individuals, were found in fairly good condition; an abundance of hay was left over. Part of this band had been transferred to the Lake Manitoba inspectorate and took ninety-four head of cattle with them.
> Crops. – There were about sixty acres of land under crop, which is a slight increase over last year.[95]

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[92] W.E. Jones, Indian Agent, Cote, Assiniboia, to SGIA, August 5, 1895, in *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1895*, 103 (ICC Exhibit 7, vol. 3).

[93] Alexander McGibbon, Inspector of Indian Agencies, to SGIA, September 27, 1898, in *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1898*, 193–94 (ICC Exhibit 7, vol. 3).

[94] Alexander McGibbon, Inspector of Indian Agencies, to SGIA, September 27, 1898, in *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1898*, 193–94 (ICC Exhibit 7, vol. 3).

[95] L.J.A. Leveque, Inspector of Indian Agencies, to SGIA, September 8, 1903, Department of Indian Affairs, "Annual Report for the Year 1903," pp. 228–30 (ICC Exhibit 7, vol. 4).

It is interesting to note that, despite Leveque's assertion that only a few members of the Band farmed or raised stock for a living, their stock statistics remained more or less constant from previous years.[96] The acres under crop had increased to 60 – the highest number on record to that date and more than double the average acreage cropped during the 1890s. The historical record also reveals that, in 1903, the Band expressed a clear interest in expanding its mixed-farming production and asked the department to provide moneys to assist the establishment of younger band members in the direction of commercial crop production. This initiative led to a series of meetings between the Band and departmental representatives, resulting in a surrender proposal that would have provided better land and some capital for band members to acquire the implements required to increase production and to assist young men who wished to make a start in agriculture.[97] As we will see, nothing resulted from these discussions, but it appears that the older men within the Band – including Chief The Key – believed that the initiative was in the best interests of the Band, as it would enable the Band as a whole to enjoy further progress.[98]

The evidence in this inquiry indicates that the Band continued to increase its agricultural activities in the years immediately preceding the 1909 surrender. In 1905, Agent H.A. Carruthers reported:

> These people are practically making a living without any help in the way of food from the Department, chiefly by the proceeds of cattle, hunting, freighting and selling hay and wood. A good start was made in farming by three young men this summer ... whom I assisted with oxen, the three of them breaking eighty-five acres of new land ...[99]

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[96] The statistics referred to take into account the separation of the Shoal River faction in 1902.

[97] See H.A. Carruthers, Indian Agent, to the Indian Commissioner, December 21, 1903, NA, RG 10, vol. 3561, file 82-1 (ICC Documents, pp. 358–61).

[98] H.A. Carruthers, Indian Agent, Pelly Agency, to David Laird, Indian Commissioner, March 11, 1904, NA, RG 10, vol. 3561, file 82-1 (ICC Documents, pp. 369–70).

[99] H.A. Carruthers, Indian Agent, Pelly Agency, to Frank Pedley, DSGIA, August 25, 1905, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1905* (ICC Documents, p. 408).

The Annual Report for the following year indicates that the three young men referred to by Carruthers had seeded the 85 acres broken by them the previous year and that, on their own initiative, they were breaking new land.[100]

In the spring of 1908, Agent W.G. Blewett advised his superiors that "gradually each year this band is purchasing the necessary implements and machinery for more farming."[101] In March 1909, he reported that the Band had "almost all the necessary implements and are buying all needed from their own resources."[102]

From an early date, therefore, it appears that the Band displayed an interest in developing a farming and stock-raising economy. Despite some early setbacks, which departmental officials attributed to the absence of a farming instructor, the Band sustained or increased its agricultural efforts up until the date of surrender.

Proposed Surrender for Exchange, 1903–06

Increased settlement in the Fort Pelly district brought repercussions for The Key, Keeseekoose, and Cote Bands as early as 1898. As noted previously, an area of approximately 20 square miles had been reserved for Pelly Agency Bands in 1893 to provide additional haylands for the Bands' burgeoning stock-raising enterprises. In 1898, however, the Department of the Interior informed Indian Affairs that a portion of these reserved haylands would be required for a proposed settlement of Doukhobors.

By Order in Council dated May 15, 1899, approximately half of the Pelly haylands – "all of Fractioned Township 31, lying West of Kee-see-koose's Indian Reserve" – was removed from the administration of the Department of Indian Affairs and placed at the disposal of the Department of the Interior for redistribution as a communal reserve for Doukhobor settlers.[103] This decision would eventually have an impact on all three Bands in the Pelly Agency.

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[100] H.A. Carruthers, Indian Agent, Pelly Agency, to Frank Pedley, DSGIA, July 4, 1906, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1906* (ICC Documents, p. 431).

[101] W.G. Blewett, Indian Agent, Pelly Agency, to Frank Pedley, DSGIA, April 2, 1908, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1908* (ICC Documents, p. 447).

[102] W.G. Blewett, Indian Agent, Pelly Agency, to Department of Indian Affairs, March 3, 1909, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1909* (ICC Documents, p. 468).

The department considered it imperative that the Pelly Agency Bands make full use of the remaining communal hay reserve, comprising approximately 6,000 acres[104] within fractional Township 30 and located directly west of Cote IR 64. In 1902, Alexander McGibbon, the Inspector of Indian Agencies, resurrected a plan originally proposed by Agent Jones ten years previously, whereby less valuable lands on The Key, Keeseekoose, and Cote reserves would be surrendered in exchange for productive lands located within what remained of the Pelly haylands reserve.[105] The proposal gained momentum in August 1902 when departmental Secretary J.D. McLean voiced his approval of the scheme insofar as it concerned the Cote Band:

> The Department notes what you say ... as to the necessity for holding the Hay lands adjacent to Coté's Reserve pending further consideration by the Indians of the question of endeavouring to secure them permanently by the surrender of a portion of their Reserve.[106]

By October, the proposal was expanded to address the requirements of the Keeseekoose Band as well. Subsequently, a flurry of correspondence ensued in an attempt to identify the lands sought by the Cote and Keeseekoose Bands, to designate which lands would be made available for a surrender in exchange, and to determine whether the Department of the Interior would agree to an exchange when it was proposed.[107]

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[103] Order in Council dated May 15, 1899 (ICC Documents, p. 298).

[104] On the issue of acreage, see D. Laird, Indian Commissioner, to Frank Pedley, December 26, 1905 (ICC Exhibit 16).

[105] See W.E. Jones, Indian Agent, to DIA, March 22, 1892 (ICC Documents, p. 261), and extract of report: Alex. McGibbon, Inspector of Indian Agencies, to DIA, June 24, 1902 (ICC Documents, p. 315).

[106] Extract of a letter from J.D. McLean, Secretary, DIA, August 16, 1902, NA, RG 10, vol. 7770, file 27117-1, pt 2 (ICC Documents, p. 337).

[107] See, for example, D. Laird, Indian Commissioner, to Indian Agent, Pelly Agency, January 17, 1903 (ICC Documents, p. 347); R.S. McKenzie, Indian Agent, to D. Laird, February 3, 1903 (ICC Documents, p. 348); D. Laird, Indian Commissioner, to Secretary, DIA, February 13, 1903 (ICC Documents, p. 349); F. Pedley, DSGIA, to P.G. Keyes, Secretary, Department of the Interior, February 21, 1903 (ICC Documents, p. 350); and J.D. McLean, Secretary, DIA, to P.G. Keyes, Secretary, Department of the Interior, March 18, 1903 (ICC Documents, p. 351).

In the meantime, H.A. Carruthers had assumed the position of agent for the Pelly Agency and had taken an interest in the exchange initiative. In June 1903, Carruthers indicated that he would soon submit "a somewhat different proposal with a view to securing the desired hay land."[108] His proposal included The Key Band in the surrender-for-exchange initiative. In the fall of 1903, Carruthers discussed the issue with the Assistant Indian Commissioner, J.A.J. McKenna, who provided the following detailed instructions:

> Referring to the discussion we had in regard to the proposal that those Indians of Key's Reserve who are desirous of starting farming should have secured for them Township 30, Range 32, and the two South rows of sections in Township 31, Range 32, W.P.M., which subject is referred to in the letter of the Department to you of the 22nd ultimo, a copy of which you kindly transmitted to me, I beg to remind you of the application of Cote's band for a portion of said Township 30, in lieu of which they were prepared to surrender a portion of Section 31 included in their reserve. You will remember that Chief Cote brought this question up, and that I told him it was delayed pending decision as to the disposal of the whole of Township 30. I have since learned that there was a proposal by Agent McKenzie on behalf of Kisikouse's band for an exchange of part of their reserve for a portion of Township 31. You were to have a further meeting with Key's band to ascertain definitely their mind as to the proposed exchange, and to report the result. I think it well to deal with all proposed exchanges of land in your agency together, and any necessary surrenders prepared and forwarded together. I therefore decided to delay reporting to the Department as to the exchange desired by Cote until you have had a further conference with Key's band. It would be well then for you to transmit to me a full report respecting the proposed exchanges, describing as accurately as possible the lands affected.[109]

Acting on the instructions provided by McKenna, Carruthers arranged a meeting with The Key Band to further discuss the surrender proposal. The terms of the proposal were laid out in detail on this occasion. Although the events of this meeting were ultimately of no consequence, since Carruthers was merely polling band members to assess their support for the proposal, the following excerpts from his report are illuminating:

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[108] Assistant Indian Commissioner to J.D. McLean, Secretary, DIA, June 16, 1903, NA, RG 10, vol. 3501, file 82, pt 1 (ICC Documents, p. 352).

[109] J.A.J. McKenna, Assistant Indian Commissioner, to H.A. Carruthers, November 9, 1903 (ICC Documents, pp. 355–56).

> I have the honour to acknowledge the receipt of your letter of the 9th. November last; relative to certain lands for Key's reserve, in Township 30, Range 32, West 1st. P.M. I have since learned from the Department of the Interior that all lands in Tp. 31, Rge 32, belong to the Doukhobors.
>
> I now beg to inform you that I spent the afternoon of the 14th. instant in the school house on Key's reserve, with the Indians of that band, who had a month's notice of the day of the meeting, and talked over at length, as to the wish and advisability of Key's band requesting that they be allowed to exchange an equal number of acres, lying to the West side of Stony Creek, as shown on attached plan, which runs through this reserve, for an equal number of acres, being all the land, lying between the Assiniboine and White Sand rivers, in Township 30, Range 32, W. 1 P.M. Also, as to this Band selling eight square-miles, more or less, as shown on attached plan, from the East side of their reserve, in order that those who wish to farm, on their new land between the two rivers, may be fitted out in horses and machinery to enable them to do so, after which, the cattle raisers to be given mowers, rakes and wagons, and the old people clothing &c. as may be arranged later, the Band a threshing machine, the balance to be funded by the Department to fit out other members of the Band who may want to start farming later.
>
> After a long talk a vote was taken, each male member of the Band, of the full age of twenty-one years being allowed to vote. I enclose you herewith the original voting list, by which you will see that the proposals were carried by a majority; only the Indians voted against it, the Treaty Halfbreeds and workers all voted for it. ...
>
> The Band would like to know, if the Department could not outfit some of the young men this Spring, and recoup itself when the land is sold, as otherwise over a year would be lost before land would be surveyed, sold and they outfitted.[110]

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[110] H.A. Carruthers, Indian Agent, to the Indian Commissioner, December 21, 1903, NA, RG 10, vol. 3561, file 82/1 (ICC Documents, pp. 358–61). As we have seen, under the provisions of Treaty 4, the Band had been provided with a one-time issuance of agricultural implements: "[T]he following articles shall be supplied to any band thereof who are now actually cultivating the soil, or who shall hereafter settle on their reserves and commence to break up the land, that is to say: two hoes, one spade, one scythe and one axe for every family so actually cultivating, and enough seed wheat, barley, oats and potatoes to plant such land as they have broken up; also one plough and two harrows for every ten families so cultivating as aforesaid ... " It is reasonable to presume that, by 1903, the "one plough and two harrows" provided to the Band under treaty would have been worn out and in need of repair or replacement. To do so, the Band required access to capital. Furthermore, the treaty did not provide for implements such as seed drills, hay mowers, gang ploughs, disc harrows, or threshing machines – mechanized implements that were essential to the profitable operation of a mixed-farming enterprise. Despite Agent W.G. Blewett's comments in 1908 and 1909 that the Band had been purchasing the implements it required, the 1903 and 1908–09 surrender discussions appear to show that the Band required additional capital investment in order to build on the progress it had made in mixed farming to that date.

A handwritten voters' list submitted with the Carruthers report indicated that nine of the 14 eligible male band members listed voted in support of the proposal. The vote was formally witnessed by the Reverend Owen Owens, the resident Church of England missionary, among others.[111]

Since Assistant Commissioner McKenna had already expressed concern about the previously tendered application of the Cote Band to execute a similar surrender for exchange, Carruthers stated that he was more inclined to exchange the majority of the coveted haylands with The Key Band because Chief Cote's Band already had "a splendid reserve and a fair quantity of hay." As the Cote Band had "a prior claim on the hay lands in question," however, Carruthers suggested that it be provided with "a strip, say three miles, more or less, long, on the west side of the Assiniboine River, by a half mile, more or less, wide, from the West edge of said river; they to forfeit an equal number of acres in the N.E. corner of their reserve."[112] In this manner, the immediate needs of both bands would be accommodated.

In February 1904, McKenna forwarded Carruthers a number of questions concerning the issue of surrenders for exchange in his agency and requested further information about the informal meeting held with The Key Band the previous December. McKenna noted that any arrangement made with The Key Band about the Pelly haylands exchange would also have to satisfy the Cote and Keeseekoose Bands, since the lands were held by all three.[113] The detailed reply returned by Carruthers outlined The Key Band's reasons for supporting the proposal. Carruthers wrote that all five men who voted against the proposal were closely related to the Chief, either by blood or by marriage. He noted, however, that he had recently discussed the situation with the Chief, who "openly acknowledges that he considered the plan was for the good of the Band," and would sign the surrender if submitted, but on the condition that the Band would never again be asked to cede its lands. Carruthers reported that, in his opinion, the Chief's initial refusal to consent was due to the belief that the surrender "was the thin edge of the wedge, and that his whole Reserve would ultimately be taken from him."[114] In conclusion, Carruthers emphasized the need to obtain adequate farming land for the future generations of The Key Band:

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[111] Those voting for the surrender included George Brass, headman; Peter O'Soup; Thomas Brass; Wm. Brass Jr; Alex. Brass Jr; Jos. Brass; Wm. Brass, headman; Chs. Thomas; and Solomon Brass. Those voting against included Chief The Key; Song way way kejick; Ka mo pi mi nin; Inche cappo; and Pay pay quosh. The signature of each band member was recorded with an "X" representing his "mark," with the exception of Peter O'Soup, Peter Brass Jr, and Charles Thomas, who signed on their own behalf. See "Vote taken at Key's Reserve this 14th day of December 1903" (contained in ICC Exhibit 16).

[112] H.A. Carruthers, Indian Agent, to the Indian Commissioner, December 21, 1903, NA, RG 10, vol. 3561, file 82-1 (ICC Documents, pp. 358–61).

[113] J.A.J. McKenna, Assistant Indian Commissioner, to H.A. Carruthers, Indian Agent, February 18, 1904, NA, RG 10, vol. 3561, file 82-1 (ICC Documents, pp. 365–68).

> The whole question resolves itself into this. If this piece of land is not obtained for Key's people, before it is withdrawn, as Township 31 was, what is to become of the young men in the future? Are they to go on for generations, eking out a precarious existence as they do now, depending on the few cattle they raise and what freighting and work they can get and the sale of a little wood and hay? It is the last chance to get a piece of land for them, as all other lands have been taken up.[115]

With the receipt of Carruthers's second report, McKenna forwarded the issue and all related documentation to Ottawa for resolution.[116] At this stage, the initiative slowed to a halt. For reasons that are not important to the present inquiry, a definitive response from the Department of the Interior was delayed for a period of many months, despite regular inquiries from Indian Affairs.

On December 13, 1905, the Department of Indian Affairs took matters into its own hands by obtaining a surrender for exchange involving 20,000 acres within Cote IR 64.[117] The Department of the Interior was then informed that no further action would be required on its behalf because the Minister of the Interior had already approved the Cote surrender for exchange with lands in the Pelly haylands. It subsequently became clear, however, that the remaining haylands jointly held by the three Pelly Agency Bands were the desired "exchange" area identified in the surrender agreement executed by the Cote Band. The new arrangement would consume all the available land, with nothing remaining for The Key Band. Asked to report on the advisability of this plan, departmental Surveyor Samuel Bray replied that it was still "possible to arrive at some understanding" with The Key Band without favouring one band over the other. He recommended that the issue be referred to Inspector W.M. Graham for a report.[118] Graham tendered his response on January 18, 1906. In his opinion, it was not necessary "to take any action effecting an exchange of land for Key's Band," since he concluded that "Key's Indians have sufficient land for their requirements."[119]

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[114] H.A. Carruthers, Indian Agent, Pelly, to David Laird, Indian Commissioner, March 11, 1904 (ICC Documents, pp. 369–70).

[115] H.A. Carruthers, Indian Agent, Pelly, to David Laird, Indian Commissioner, March 11, 1904 (ICC Documents, pp. 369–70).

[116] J.A.J. McKenna, Assistant Indian Commissioner, to DSGIA, April 9, 1904, NA, RG 10, vol. 3562, file 82-1 (ICC Documents, pp. 373–76).

[117] D. Laird, Indian Commissioner, to Frank Pedley, DSGIA, December 26, 1905, NA, RG 10, vol. 3561, file 82-1 (ICC Exhibit 16).

Despite the fact that Carruthers had regularly called for a surrender for exchange that would benefit both The Key and the Cote Bands,[120] and despite the support of Chief Surveyor Samuel Bray, the department ultimately adopted Graham's recommendations and added the entire residual Pelly haylands to the Cote Reserve in exchange for a surrender of equal acreage from that reserve. The Key Band received no further benefit from the haylands, which had been reserved for the use of all three Pelly Agency Bands in 1890.

THE 1909 SURRENDER

The ascension of the Laurier government to power in 1896 ushered in a new era of immigration and western expansion in Canada. Under the direction of Clifford Sifton, Minister of the Interior from 1896 to 1905, the new government implemented an aggressive immigration policy aimed at attracting agrarian settlers from around the globe. Thousands of immigrants arrived in Canada to take advantage of the free dominion lands that the government was offering to willing homesteaders. Many of these immigrants joined migrants from the rest of Canada, where farm lands had become increasingly difficult to acquire. Together, these groups relocated within the vast, fertile stretches of western Canada, especially the southern portions of present-day Manitoba, Saskatchewan, and

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[118] Samuel Bray, Chief Surveyor, to DSGIA, January 12, 1906 (ICC Documents, p. 414).

[119] W.M. Graham, Inspector of Indian Agencies, to the Secretary, DIA, January 18, 1906, NA, RG 10, vol. 7770, file 27117-2 (ICC Documents, p. 439).

[120] See H.A. Carruthers, Indian Agent, to Indian Commissioner, December 21, 1903 (ICC Documents, pp. 358–63), March 11, 1904 (ICC Documents, pp. 369–72); and H.A. Carruthers, Indian Agent, to the Secretary, DIA, June 7, 1904 (ICC Documents, pp. 384–86), August 2, 1904 (ICC Documents, p. 396), and March 10, 1905 (ICC Documents, pp. 403–04).

Alberta.[121] Since western expansion was one of the major concerns of the era, it is not entirely surprising that the second portfolio held by the Minister of the Interior – Superintendent General of Indian Affairs – received less attention. Under Sifton and his predecessors, "Indians were viewed always in the context of western development: their interests, while not ignored, only rarely commanded the full attention of the responsible minister."[122] This would change under Sifton's successor, Frank Oliver, who, from 1905 to1911, took a more aggressive approach to Indian Affairs.

Historian Sarah Carter has argued that the major preoccupation of Indian Affairs administrators during the Laurier era "was to induce Indians to surrender substantial portions of their reserves, a policy which ran counter to efforts to create a more stable agricultural economy on reserves."[123] Likewise, Professor Brian Titley has argued that the Laurier government – especially Oliver – followed a policy of "acceding to the demands of those who coveted Indian land."[124] Most bureaucrats of the day believed that the policy of having First Nations divest themselves of "unused" or "unnecessary" areas of their reserves was justified in the face of continued immigration to the western provinces. The following extract from the Deputy Superintendent General's Annual Report for 1908 is illustrative:

> So long as no particular harm nor inconvenience accrued from the Indians' holding vacant lands out of proportion to their requirements, and no profitable

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[121] For an overview of dominion lands policy, see D.J. Hall, "Clifford Sifton: Immigration and Settlement Policy, 1896–1905," in Howard Palmer, ed., *The Settlement of the West* (Calgary: University of Calgary Press, 1977); Gerald Friesen, The *Canadian Prairies: A History* (Toronto: University of Toronto Press, 1987), 242–74; and Chester Martin, *'Dominion Lands' Policy* (Toronto: McClelland & Stewart, 1973).

[122] D.J. Hall, "Clifford Sifton and Canadian Indian Administration, 1896–1905," *Prairie Forum* 2, 2 (1977): 128.

[123] Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen's University Press, 1991), 244.

[124] E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 21. The first amendment, passed in 1906, allowed for 50 per cent of the purchase price to be distributed to the First Nation at the time of sale. The former allowance had been 10 per cent. The increase acted as a powerful incentive for negotiating surrender because First Nations were short of accessible capital. The second amendment, passed in 1911, enabled the removal of Indians from any reserve that was located within or beside a town of 8,000 or more residents. See *The Historical Development of the Indian Act* (Ottawa: DIAND, 1978), 103–04, 108–09.

> disposition thereof was possible, the department firmly opposed any attempt to induce them to divest themselves of any part of their reserves.
>
> Conditions, however, have changed and it is now recognised that where Indians are holding tracts of farming or timber lands beyond their possible requirements and by doing so seriously impeding the growth of settlement, and there is such demand as to ensure profitable sale, the product of which can be invested for the benefit of the Indians and relieve pro tanto the country of the burden of their maintenance, it is in the best interests of all concerned to encourage such sales.[125]

According to Oliver, "the interests of the people must come first, and if it become a question between the Indians and the whites, the interests of the whites will have to be provided for."[126] It appears that this policy was implemented in an active way. On December 1, 1909, Oliver announced in the House of Commons that 725,517 acres of surrendered Indian lands had been sold by the Department of Indian Affairs between July 1, 1896, and March 31, 1909.[127]

One procedural tool developed by Oliver to assist in freeing up land for immigrant settlers was designed to give departmental officials greater latitude in offering cash advances during surrender negotiations. With the approval of the Minister, the surrender provisions of the *Indian Act* were amended to increase the permitted payment that could be made to bands on surrender, from the former ceiling of 10 per cent to a new maximum of 50 per cent of the total sale proceeds. The amendment also enabled the department to negotiate exactly how the increased amount could be provided to the band. As a result, the details of a surrender agreement could include expenditures for items such as agricultural provisions, fencing, or support for the elderly. These expenditures were to be included within the 50 per cent advance, thereby affording the department considerable flexibility in negotiating surrenders. When introducing the amendment in the House of Commons, Oliver outlined his intentions as follows:

> This Bill contains only one section and has only one object. It is simply to change the amount of the immediate and direct payment that may be made to Indians

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[125] Frank Pedley, DSGIA, to Frank Oliver, Minister of the Interior and Superintendent General of Indian Affairs, in *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1908*, xxxv (ICC Documents, p. 445).

[126] Canada, House of Commons, *Debates* (March 30, 1906), cols. 948–50.

[127] Canada, House of Commons, *Debates* (December 1, 1909), col. 784.

> upon the surrender of their reserve. At the present time Indians on surrendering their lands are only entitled to receive ten per cent of the purchase price either in cash or other value. This we find, in practice, is very little inducement to them to deal for their lands and we find that there is a very considerable difficulty in securing their assent to any surrender ... . It was brought to the attention of the House by several members, especially from the Northwest, that there was a great and pressing need of effort being made to secure the utilization of the large areas of land held by Indians in their reserves without these reserves being of any value to the Indians and being a detriment to the settlers and to the prosperity and progress of the surrounding country. Several suggestions were made with the view of facilitating the object which seemed to be generally acceptable to the House and it seemed to me, in considering the matter, that one step that might be taken would be to provide for increasing this first payment to the Indians from ten per cent to as high as fifty per cent according to the judgment of the government in the matter and according to the case ... .[128]

Combined, the new policy and procedural directives developed by the department had an immediate effect on the quantity of Indian land surrendered on the prairies, where agricultural land was deemed to be in great demand.

In the spring of 1908, Dr E.L. Cash, the Member of Parliament for the MacKenzie constituency from 1904 to 1917,[129] asked the department about the possibility of a surrender of The Key Reserve. Dr Cash had once been the medical officer assigned to the Pelly Agency and had been on contract to the department to provide services to the Indians there. In addition to knowing the departmental administrators in that region, Cash would have been familiar with the Agency's reserves.[130] On receipt of Cash's inquiry, Deputy Superintendent General Frank Pedley responded that the department was not aware of any "correspondence intimating a desire on the part of the Indians or any action towards a surrender of the Keys reserve."[131]

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[128] Canada, House of Commons, *Debates* (June 15, 1906), 5421–22 (Frank Oliver, Superintendent General of Indian Affairs) (ICC Documents, p. 423).

[129] See *Directory of Members of Parliament and Federal Elections for the North-West Territories and Saskatchewan, 1887–1966* (Regina: Saskatchewan Archives Board, 1967), 20.

[130] See R.S. McKenzie, Indian Agent, to SGIA, July 15, 1901, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902,* 167–69 (ICC Documents, pp. 312–14).

[131] Frank Pedley, Deputy Superintendent General, to E.L. Cash, Member of Parliament, April 30, 1908 (ICC documents, p. 449).

Less than three months later, on July 24, 1908, Agent W.G. Blewett at Pelly reported to Inspector Graham that certain members of The Key Band had asked to sell 13 sections of their reserve to raise money to buy farm animals and implements:

> I beg to say that the members of Key Band have asked me to write you and request you to arrange with the Department for the Sale of part of their Reserve. They feel that they have too much land and not enough horses and implements to work satisfactorily, so desire to sell part of their Reserve. They wish you to arrange with the Department before you come to see them so that you can pay them at once when you come to take the surrender. The conditions are as follows: –
>
> 1st. To surrender a strip of land one mile wide off the West side of the Reserve, and a strip one and a half miles wide off the East side, in all 13 sections.
> 2nd. Only those at present taking Treaty at Keys Reserve to participate.
> 3rd. The first payment to be cash at the time of surrender and to be $80.00 per head.
> 4th. Any one [sic] losing house or improvements by the surrender to be recompensed for the same. ...
>
> Personally, I think it would be a good thing to sell part of their Reserve and buy outfits or those implements they are short of instead of getting Government assistance. If you think this is a good plan I hope you can have it arranged so as to settle the deal this Fall.[132]

Graham forwarded Blewett's report to headquarters on August 13, 1908.[133] In his transmittal letter, Graham noted that, although "this Band have a lot of poor land on one Section of the Reserve which would be impossible to sell," they possessed a quantity of "very fine land on another Section of the Reserve." In his opinion, if a portion were to be surrendered and sold "there would be enough land left, in fact more than the Band can ever use." Before surrender negotiations could be initiated, however, Graham noted that he would require a decision as to whether the Shoal River Indians would be allowed to vote on the surrender proposal.[134]

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[132] W.G. Blewett, Indian Agent, Kamsack, to "Sir," July 24, 1908, NA, RG 10, vol. 4039, file 329759 (ICC Documents, p. 454).

[133] W.M. Graham, Inspector of Indian Agencies, to Secretary, Department of Indian Affairs, Ottawa, August 13, 1908, NA, RG 10, vol. 4039, file 329759 (ICC Documents, pp. 455–56).

[134] W.M. Graham, Inspector of Indian Agencies, to Secretary, Department of Indian Affairs, Ottawa, August 13, 1908, NA, RG 10, vol. 4039, file 329759 (ICC Documents, pp. 455–56).

The record submitted for the purpose of this inquiry does not yield further correspondence relating to The Key Band surrender until January 1909. On this occasion, Graham informed his superiors that he had met with an undisclosed number of The Key band members[135] to discuss the detailed terms under which the Band would consider surrendering land:

> ... I beg to say that I was on the Reserve on Monday last, the 18th inst., and met the Indians and discussed the matter with them. Instead of surrendering thirteen sections as they wished to do in the first place, I persuaded them to surrender seventeen sections [10,880 acres] as the Land in question is not being used and is very light and cut up with Sloughs, and scrub, and will not bring a high price. However, there is a time coming when the Land will sell.
>
> The Indians wanted $100.00 each down at the time of surrendering the thirteen sections first mentioned, but have agreed to accept this amount as a first payment on Seventeen Sections, should they surrender. I think this request is a reasonable one.
>
> The Indians would like to surrender this Land and receive a payment by April next, and I would be glad to know what the Department intend to do in the matter.
>
> When this Reserve was set aside some thirty years ago, I understand the Shoal River Indians were included in the allotment but as the Indians never resided on the Reserve from the beginning, the Key band do not consider them as shareholders in their Reserve. The Shoal River Indians are living on a small Reserve at Shoal River and are, I understand, quite contented to remain where they are, and on the other hand the Key Band are quite contented to relinquish any claim they may have to the Shoal River Reserve.
>
> There are at present about 87 Indians on Keys Reserve, it would take therefore about $8700.00 to make the payment, and perhaps an extra thousand dollars to settle for any improvements that might be on the Surrendered Land. The total payment will be less than one dollar per acre.
>
> I am enclosing herewith an old map (the only one I have) showing the land it is proposed to surrender. I would be glad to have the map returned.[136]

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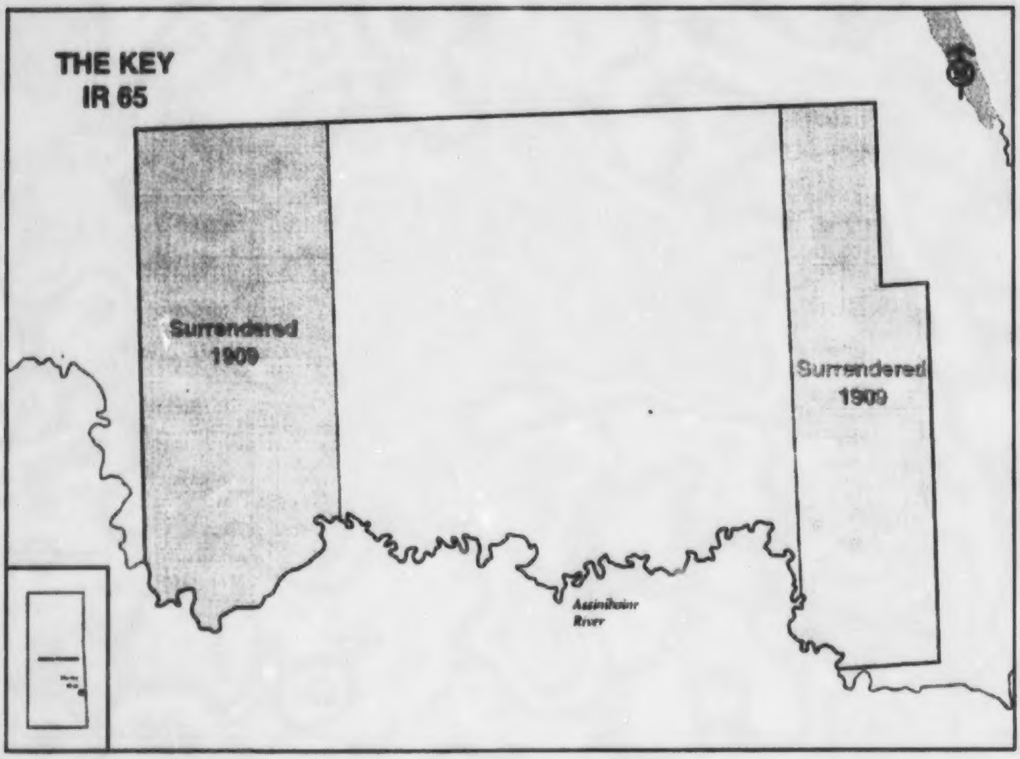
[135] It is possible that Graham arranged this meeting on instructions from Ottawa. The assembled record does not provide clarification.

[136] W.M. Graham, Inspector of Indian Agencies, to Frank Pedley, Deputy Superintendent General, January 21, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, p. 461).

The $100 cash payment at the time of surrender, as well as expenditures relating to agricultural supplies and assistance for the elderly, was to be paid from the capital generated by the sale of the surrendered lands.[137]



Chief Surveyor Bray reviewed the proposal thereafter and submitted his "Description for Surrender" on January 29:

> All those certain two tracts of land situated in the Key Indian Reserve No. 65, in the Province of Saskatchewan containing together an approximate area of 11,500 acres and described as follows:–

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[137] "Surrender of Land on Key's Reserve," May 18, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, pp. 476–78).

> First:– All that portion of the said Reserve lying East of the East limits of projected sections 4, 9, 16, 21, 2[?], and 33 in Township 32 Range One, West of the Second Meridian.
>
> Second:– All that portion of the said Reserve lying West of the West limits of projected Sections etc 11, 14, 23, 26, and 35 in Township 32, Range 2, West of the Second Meridian.
>
> Note – The above includes the whole tract. The area of land will prove to be considerably less as there are several small lakes to be excepted in the actual survey. – S.B.[138]

At 11,500 acres, Bray's calculation of the proposed area to be surrendered was approximately 620 acres more than the estimated area of 10,880 acres discussed at the pre-surrender meeting of January 18, 1909, and was 3,180 acres more than the Band had proposed be surrendered in 1908. The Deputy Superintendent General authorized the surrender as outlined on February 13, 1909.[139]

A number of months passed before Inspector Graham was able to schedule his journey to the Pelly Agency to take surrenders from The Key and Keeseekoose Bands.[140] During this time, Agent Blewett wrote to the department to express concern on behalf of the bands about the delays:

> When Inspector Graham was here last January, the Indians of the Key's and Keeseekoonse [sic] Bands asked him to try to arrange for a surrender of part of the Reserves. They are very anxious to know if the Department has sanctioned this and if so, when they can expect to have the surrender taken. I would like to ask, that if a surrender is to be taken, that it be done, if convenient, before the breaking season starts (May 20th) so that the Indians may get oxen etc. to start farming early in the season.[141]

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[138] "Description for Surrender," S. Bray, Chief Surveyor, January 29, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, p. 463).

[139] Frank Pedley, DSGIA, to W.M. Graham, Inspector of Indian Agencies, February 18, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, p. 466).

[140] A surrender proposal had also been agreed to by the Keeseekoose Band, and a near identical surrender agreement was concluded with that Band on May 15, 1909.

[141] W.G. Blewett, Indian Agent, to the Secretary, DIA, April 19, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, p. 469).

Graham arrived in the Agency on May 13 and conducted surrenders at the Keeseekoose Reserve on May 15 and at The Key Reserve on May18. He outlined both these transactions in his report to the Deputy Superintendent on May 21, 1909:

> I have the honour to inform you that I arrived in this Agency on the 13th of this month and at once notified the Indians of Keeseekoose Band of a meeting to be held on Saturday, May 15th, 1909, for the purpose of discussing the matter of surrendering a part of their reserve. The meeting was held on that date, and nearly every member of the Band was present. A vote was taken and the Band were unanimous for surrendering. The papers were duly signed and I at once began to make the payment of $85. per head. There were 134 Indians present and the payment amounted to $11,390. There are still four Indians to pay, and I shall require $340. to pay them, as the amount sent to me was not large enough to complete the payment.
>
> With regard to improvements on the land surrendered, – I have made a careful valuation, which is as follows, and I would ask that a cheque be sent me just before I next visit this Agency, so that I can make settlement, – ...
>
> I held a meeting of Key's Band on the 18th of the month, and the Indians of this reserve also agreed to surrender approximately 11,500 acres. Nearly all the members of the Band were present and the vote was unanimous. I made a payment of $100.00 to each of the Indians.
>
> I paid out in all $19,990. which left a balance of $10. which is herewith enclosed.
>
> I herewith enclose the Forms of Surrender, duly executed, the paysheets and a statements [sic] accounting for Cheque No. 28, $20,000., all of which I trust will be found satisfactory.[142]

A completed surrender document bearing the purported signatures or marks of seven band members was also forwarded to Ottawa at this time:

> Surrender of Key I.R. No. 65 – "Know all Men by these Presents that we, the undersigned Chief and Principal men of The Key band of Indians residents on our Reserve on the Assiniboine River in the province of Saskatchewan and Dominion of Canada, for and acting on behalf of the whole people of our said Band in Council assembled, Do hereby release, remise, surrender, quit claim and yield up unto Our Sovereign Lord the King, his Heirs and Successors forever, ALL AND SINGULAR, those certain parcels or tracts of land and premises situate, lying and being in the Key Indian Reserve, No. 65, in the Province of Saskatchewan containing together an

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[142] W.M. Graham, Inspector of Indian Agencies (at Kamsack), to DSGIA, May 21, 1909, NA, RG 10, vol. 7770, file 27117-3 (extract of this document can be found at ICC Documents, p. 481).

> approximate area of eleven thousand five hundred acres be the same or more or less being composed of [the 11,500 acres described by Bray]
>
> "It is hereby understood and agreed that the sum of One hundred dollars shall be paid to each Indian at the time of execution of these presents.
>
> "And upon the further conditions as follow, –
>
> 1. Indian children between the ages of twelve and eighteen to have their interest money funded for them.
> 2. In the event of implements, wagons, machinery, harness and stock being required for Indians to start farming, these may be purchased from the proceeds of the sale of the land.
> 3. That the land hereby surrendered be sold by public auction to the highest bidder."[143]

The inquiry record contains no evidence confirming whether the seven signatories to the surrender represented a quorum of eligible voters in attendance at the surrender meeting because Inspector Graham's surrender report, dated May 21, 1909, does not provide an account of the number of voting members in attendance. The surrender paylist, dated the same day as the surrender meeting, shows that 17 eligible voting members of The Key Band received their $100 cash payment that day.[144] The First Nation contends, however, that there were in fact 18 eligible voting members present on May 18, 1909, since one of the young men of the Band had been mistakenly recorded as being 20 years old.[145] Neither figure is conclusive, however, owing to the deficiencies in the Graham report, as noted above.

A Form 66 affidavit declaring that the surrender provisions of the *Indian Act* had been followed was signed jointly by Inspector Graham and Chief The Key on May 19, 1909. This document stipulated, among other things:

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[143] Surrender document, The Key Band, dated May 18, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, pp. 476–78).

[144] See the paylist included within "Those Eligible to Vote in the Alleged Surrender of The Key Reserve May 18th, 1909," Lockhart & Associates, January 31, 1997 (ICC Exhibit 9).

[145] George Brass, the son of No. 28 Willie Brass, was recorded by the departmental officer as being 20 years of age on May 18, 1909. In her analysis of the paylist, however, Dorothy Lockhart, an experienced paylist researcher contracted by the First Nation, argued that George Brass turned 21 years of age on January 14, 1909, and was therefore eligible to vote at the surrender meeting in question. See "Those Eligible to Vote in the Alleged Surrender of The Key Reserve May 18th, 1909," Lockhart & Associates, January 31, 1997, p. 3 (ICC Exhibit 9).

> That the annexed release or surrender was assented to by a majority of the male members of the said Band of Indians of the Key Reserve of the full age of twenty-one years then present ...
>
> That no Indian was present or voted at said council or meeting who was not a habitual resident on the Reserve of the said Band of Indians or interested in the land mentioned in the said Release or Surrender. ...[146]

All this documentation was forwarded to the Clerk of the Privy Council on June 8, 1909, along with a recommendation for acceptance from Superintendent General Oliver.[147] The surrender was confirmed by Order in Council PC 1379 dated June 21, 1909,[148] and the surrendered lands were offered for sale by public auction on December 1, 1910. Approximately 35 quarter sections of the surrendered lands did not sell at the auction.[149]

POST-SURRENDER EVENTS

On November 13, 1910, The Key Band surrendered an additional parcel of its reserve land for sale to the Church of England,[150] so that the mission school and church built on reserve lands could be protected from encroachment in the event of further surrenders. The event was described by the Reverend Harry B. Miller, a historian of The Key Band, in these terms:

> With the land being surrendered for white settlement less than a half-mile to the east, the area which included the St. Andrew's Church property was in jeopardy, as it also was reserve property. In order to assure its continued existence as part of the heritage of the people, it was decided that this property (9.09 acres), should be surrendered to "The King" for disposition to "the authorities of the Church of England" ... The surrender was agreed to and signed on December 13, 1910, with "nearly all of the

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[146] Affidavit signed by Wm. Graham and Chief the Key, May 19, 1909 (ICC Documents, p. 480).

[147] Frank Oliver, Superintendent General of Indian Affairs, to the Governor General in Council, June 9, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, p. 482).

[148] OCPC 1379, June 21, 1909, NA, RG 2, Series 1 (ICC Documents, p. 483).

[149] See W.M. Graham, Inspector of Indian Agencies, to the Secretary, DIA, December 6, 1910 (ICC Doceuments, pp. 499–500), and Memorandum: W.A. Orr, In Charge of Lands & Timber Branch, DIA, to the DSGIA, January 30, 1911 (ICC Documents, p. 506).

[150] In 1955, the Church of England in Canada, as it was then known, became the Anglican Church of Canada. See *Gage Canadian Dictionary* (Toronto: Gage Educational Publishing, 1983), 43.

> band members present." The principal men actually signing the document of surrender were: The Key - chief; George Brass - Headman; Thomas Brass, Willie Brass Jr., Peter O'Soup, Charles Thomas, James Key, George Brass Jr., Moses Brass.
>
> Thus it was assured that, no matter what might happen in future to other reserve property, St. Andrew's Church and property, as described in the surrender agreement, would remain, forever, the property of the church and the people of the Key Reserve.[151]

Agent Blewett took this surrender two weeks after the lands surrendered in 1909 had been sold at public auction. The surrender documents forwarded to Ottawa by Blewett bear the signatures or marks of nine presumably eligible voting members: Chief The Key, Headman George Brass Sr., Thomas Brass, Wm. Brass, Peter O'Soup, Charles Thomas, James Key, George Brass Jr., and Moses Brass.[152] An affidavit attesting to the validity of the surrender was executed in the presence of J.P. Wallace, Justice of the Peace, on December 23, 1910. Signed or marked by Blewett and Chief The Key, the affidavit was witnessed by A.A. Crawford, the Agency Clerk.[153]

In January 1911, Dr E.L. Cash, the local Member of Parliament, expressed interest in the sale of surrendered lands of The Key Band that had not sold when placed at public auction in December 1910. Perhaps as a result of this interest, the department decided to offer all unsold surrendered lands in the Pelly Agency for sale at public auction later that year.[154] As a result, the sale of these previously unsold lands generated additional revenue for The Key Band.

Shortly after the second auction, members of The Key Band made inquiries concerning interest payments due to them under the conditions of the May 18, 1909, surrender agreement.[155]

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[151] See Rev. Harry B. Miller, *These Too Were Pioneers: The Story of The Key Indian Reserve No. 65 and the Centennial of the Church, 1884–1984* (Melville, Sask.: Seniors Consulting Service, 1984), 39 (ICC Exhibit 6).

[152] Surrender document, The Key Band, dated December 13, 1910 (ICC Documents, pp. 501–03).

[153] Surrender Affidavit, dated December 23, 1910 (ICC Documents, p. 504).

[154] See Memorandum: W.A. Orr, In Charge of Lands & Timber Branch, DIA, to the DSGIA, January 30, 1911 (ICC Documents, p. 506), and "Keys, Keeseekouse (2nd Sale) & Cote, 2nd Sale," [sic] June 7, 1911 (ICC Documents, p. 507). In 1925, a third sale of unsold The Key IR 65 land was arranged, with prospective tenders being received by Indian Commission W.M. Graham. One such tender was received from W.G. Blewett, the former Indian Agent, who had started a new career as a real estate and insurance salesman. See W.G. Blewett, Kamsack, to W.M. Graham, Indian Commissioner, April 20, 1925 (ICC Documents, p. 555), and "Notice of Sale of Indian Lands," W.M. Graham, Indian Commissioner, April 29, 1923 (ICC Documents, p. 544).

[155] A.A. Crawford, Agency Clerk, to the Secretary, DIA, June 28, 1911 (ICC Documents, p. 508).

Departmental accountants determined that no funds were available for distribution at the time, a decision that was conveyed to Blewett for explanation to the Band.[156] The record shows that an interest distribution of $10 per capita ($880 for entire Band) was paid to the band members in January 1913.[157] A subsequent interest distribution of $182 was paid to the Band in January 1914.[158] It is not possible to calculate the per capita payment for 1914, since the record does not include census information for that year. The record contains no further information concerning interest payments.

Finally, the record in this inquiry does not include any evidence that any member of The Key Band made any contemporary complaint concerning the 1909 surrender.

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[156] See J.D. McLean, Assistant Deputy and Secretary, DIA, to W.G. Blewett, Indian Agent, December 13, 1911 (ICC Documents, p. 509).

[157] Indian Agent, Kamsack, to the Secretary, DIA, January 28, 1913 (ICC Documents, p. 516).

[158] W.G. Blewett, Indian Agent, to Secretary, DIA, January 12, 1914 (ICC Documents, pp. 527–28).

PART III

ISSUES

The Commission has been asked in this inquiry to determine whether Canada owes an outstanding lawful obligation to The Key First Nation as a result of events surrounding the surrender of a portion of IR 65 in 1909. The parties agreed to frame the issues before the Commission in the following manner:

ISSUE 1 **Was there a valid surrender in 1909 of a portion of The Key reserve by The Key Band?**

In particular, were the Treaty 4 provisions regarding the consent of bands to the alienation of their reserve lands complied with?

ISSUE 2 **Was the *Indian Act*, RSC 1906, c. 81, complied with?**

In particular, did a majority of the male members of The Key Band who were 21 years of age and over assent to the surrender?

ISSUE 3 **Were the Shoal River Indians members of The Key Band at the time of the surrender in 1909, and, if so, were they entitled to vote on the surrender?**

ISSUE 4 **Did Canada have any pre-surrender fiduciary obligations to The Key Band and, if so, did Canada fulfil or did Canada breach any such fiduciary obligations with respect to the surrender of 1909?**

In particular, was the surrender obtained as a result of undue influence or misrepresentation?

We will address these issues in the following section of this report.

PART IV

ANALYSIS

ISSUE 1 VALIDITY OF THE 1909 SURRENDER

Was there a valid surrender in 1909 of a portion of The Key reserve by The Key Band?

In particular, were the Treaty 4 provisions regarding the consent of bands to the alienation of their reserve lands complied with?

Applicability of Treaty 4

A preliminary issue in this claim concerns the applicability of certain provisions of Treaty 4 to the process by which Indian reserve land is surrendered for sale or lease.

The *Indian Act* includes several procedural requirements regulating the surrender of Indian reserve land. These provisions govern the means by which consent to the alienation of Indian reserve land is obtained from the band for whom the land has been set aside. The Key First Nation submits that the wording of the treaty provides for a threshold of consent that exceeds and overrides the threshold provided for in the *Indian Act*. This argument is based on the following provisions of Treaty 4:

> And Her Majesty the Queen hereby agrees, through the said Commissioners, to assign reserves for said *Indians*, such reserves to be selected by officers of Her Majesty's Government of the Dominion of Canada appointed for that purpose, after conference with each band of the Indians, and to be of sufficient area to allow one square mile for *each family of five, or in that proportion for larger or smaller families.*
>
> Provided, however, that it be understood that if, at the time of the selection of any reserves as aforesaid, there are any settlers within the bounds of the lands reserved for any band Her Majesty retains the right to deal with such settlers as she shall deem just, so as not to diminish the extent of land allotted to the Indians; *and provided further that the aforesaid reserves of land, or any part thereof, or any interest or right therein, or appurtenant thereto, may be sold, leased or otherwise disposed of by the said Government for the use and benefit of the said Indians, with the consent of the Indians entitled thereto first had and obtained*; but in no wise shall

> the said Indians, or any of them, be entitled to sell or otherwise alienate any of the lands allotted to them as reserves.[159]

In comparison, the surrender provisions of the 1906 *Indian Act* stipulated:

> **49.** Except as in this part otherwise provided, *no release or surrender of a reserve*, or a portion of a reserve, held for the use of the Indians of any band, or of any individual Indian, *shall be valid or binding, unless the release or surrender shall be assented to by a majority of the male members of the band of the full age of twenty-one years*, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of an officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General, or of an officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General.
> 2. No Indian shall be entitled to vote or be present at such council, unless he habitually resides on or near, and is interested in the reserve in question.
> 3. The fact that such release or surrender has been assented to by the band at such council or meeting shall be certified on oath by the Superintendent General, or by the officer authorized by him to attend such council or meeting, and by some of the chiefs or principal men present thereat and entitled to vote, before some judge of a superior county or district court, stipendiary magistrate or justice of the peace, or, in the case of reserves in the province of Manitoba, Saskatchewan or Alberta, or the Territories, before the Indian commissioner, and in the case of reserves in British Columbia, before the visiting Indian Superintendent for British Columbia, or, in either case, before some other person or officer specially thereunto authorized by the Governor in Council.
> 4. When such assent has been so certified, as aforesaid, such release or surrender shall be submitted to the Governor in Council for acceptance or refusal.[160]

The First Nation submits that the provisions of Treaty 4 were clearly intended to set aside reserve land for the benefit of all band members. As a result, counsel argues that it could not have been intended that the consent required for a valid surrender would need to have been obtained only from males aged 21 and over, as provided in the *Indian Act*. At a minimum, according to the First Nation, consent to surrender would have had to be obtained from "a majority of the Band members of sufficient age who would normally be involved in the decision making of the Band, given the custom of the Band at the time."[161] If this proposition were to be accepted by this Commission, it would clearly amount to a more stringent requirement than the provisions of the *Act*. These provisions require that a majority of male band members over the age of 21 years and habitually resident on or near, and interested in, the reserve in question attend a duly constituted surrender meeting, and that a majority of those in attendance vote in favour of the surrender.[162]

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[159] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* 6 (Ottawa: Queen's Printer, 1966) (ICC Exhibit 15). Emphasis added.

[160] *Indian Act*, RSC 1906, c. 81, s. 49. Emphasis added.

Aware that a similar argument was raised and rejected by this Commission in the Kahkewistahaw surrender inquiry,[163] the First Nation has attempted to distinguish the ruling in the present case. Counsel submits that the treaty must be interpreted in this case in accordance with The Key First Nation's traditions of "clan governance," which were attested to by Chief Papequash in the community sessions held during the course of this inquiry.[164] Chief Papequash stated:

> In the exercise of leadership under the clan system a leader did not act upon his own initiatives, and that is the way that I act on behalf of my people today. I don't act upon my own initiatives. Like I said, the honour of one is the honour of all. In matters that concerned land, in matters that concerned government, defence, provisions of necessities, education and medical practices, he was expected to seek and rely upon the guidance of a council of leading clan fathers and mothers in the tribe.[165]

The First Nation submits that, as there was no evidence led in the Kahkewistahaw inquiry regarding the internal government of that Band, it is open to this Commission to reach a different result on this issue in this case.

Furthermore, the First Nation argues that its treaty right, having never been extinguished by the *Indian Act*, is therefore protected by section 35(1) of the *Constitution Act*, which would require the Crown to justify any infringement on that right in accordance with the principles enunciated by the Supreme Court of Canada in *R. v. Sparrow.*[166] Since the original surrender provisions of the *Indian Act* were enacted in 1868,[167] and therefore predate Treaty 4, the First Nation submits that it cannot have been intended that any legislated surrender provisions (even the subsequent 1906 *Act*) would have the effect of overriding the higher threshold established by Treaty 4.[168]

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[161] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 1, p. 10.

[162] *Indian Act*, RSC 1906, c. 81, s. 49.

[163] Indian Claims Commission, *Inquiry into the 1907 Reserve Land Surrender Claim of the Kahkewistahaw First Nation* (Ottawa, February 1997), reported (1998) 8 ICCP 3.

[164] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 1, p. 20.

[165] ICC Transcript, November 20, 1997, pp. 50–52 (Chief Papequash)

In further support of its argument that the treaty right is protected by section 35(1) of the *Constitution Act, 1982*, the First Nation relies on the recent decision of the Supreme Court of Canada in *R. v. Marshall.*[169] In that case, the majority of the Court held that the nature of a treaty right may be determined with reference to extrinsic evidence concerning the historical and cultural context in which the treaty was concluded, even where the provision in question is not ambiguous on its face.[170] The majority also held that the Court must give effect to the common intention of the parties at the time of treaty signing, as opposed to merely giving effect to the terms of the document.[171]

Applying the above reasoning to the facts of his case, counsel for the First Nation submits that, at the time Treaty 4 was signed, it was the intention of the Crown and of the Band that consent to surrenders of reserve land would be obtained from "the Indians," or would be obtained "in accordance with the customs of the Band at the time." Counsel also argues that Canada has not introduced any evidence of an intention on the part of Parliament to modify or extinguish the treaty right in question. He states further that there is no evidence that the right has been modified or extinguished *in fact,* and that the burden of proof on this point lies on Canada.[172]

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[166] *R. v. Sparrow* (1990), 56 CCC (3d) 263 (SCC).

[167] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 1, p. 10, citing *Indian Act,* SC 1868, c. 42, s. 8.

[168] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 1, p. 11.

[169] *R. v. Marshall*, [1999] SCJ no. 55, file 26014.

[170] *R. v. Marshall*, [1999] SCJ no. 55, file 26014 at paragraph 11.

[171] *R. v. Marshall*, [1999] SCJ no. 55, file 26014 at paragraph 40.

[172] James D. Jodouin to Indian Claims Commission, November 12, 1999, pp. 5– 8.

Canada's position on this issue is to rely on the previous ruling of this Commission in the Kahkewistahaw surrender inquiry. In that inquiry, the Commission disposed of this issue on the basis of two separate lines of reasoning. First, the Commission decided that no inconsistency exists between the 1906 *Indian Act* and Treaty 4 on the question of surrender requirements, as the latter does not establish a required level of consent or a means of expressing that consent. In the alternative, the Commission held that, at the time that the 1906 *Act* was proclaimed, dominion legislation could substantively affect treaty rights without constitutional restraint, since section 35 of the *Constitution Act, 1982*, which affirms existing aboriginal and treaty rights, did not yet exist.[173] Canada has also raised several objections with respect to the First Nation's submission concerning "clan governance," the first two of which concern the evidence required to establish the existence of the alleged governance structure.

First, counsel for Canada argues that there is insufficient evidence on which to determine the nature of the Band's traditional governance structure, since the only evidence on this issue consists of excerpts of Chief Papequash's submissions at the community sessions. In support of this argument, he points to the lack of any formal research or analysis that establishes the exact nature of the First Nation's traditional form of government.[174]

Second, counsel states that the only other evidence on the record relevant to the issue appears to be inconsistent with the position taken by the First Nation, in that it contradicts the notion that women took part in the internal government of the Band.[175] As a result, counsel for Canada submits that, on the evidence, the alleged governance structure cannot be established as a fact.

Notwithstanding the foregoing evidentiary issues, Canada further states that, as a matter of law, the First Nation has not established that any particular decision-making process was imported into Treaty 4 that would acquire the protection of section 35(1) of the *Constitution Act, 1982*.[176] As well, counsel contends that section 35(1) should not be applied retrospectively to a historical event that took place before the *Constitution Act, 1982,* created the right sought to be vindicated.[177]

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[173] Indian Claims Commission, *Inquiry into the 1907 Reserve Land Surrender Claim of the Kahkewistahaw First Nation* (Ottawa, February 1997), (1998) 8 ICCP 3, n. 176 at p. 70.

[174] Submission on Behalf of the Government of Canada, May 27,1999, p. 19.

[175] Submission on Behalf of the Government of Canada, May 27, 1999, p. 19.

[176] Submission on Behalf of the Government of Canada, May 27, 1999, p. 20.

Finally, counsel for Canada states that the decision of the Supreme Court in *Marshall* is not applicable to the facts in The Key inquiry. First, he reiterates that, unlike the conflict between the particular treaty right and the specific legislative provision in *Marshall*, no conflict exists between the "consent" pursuant to Treaty 4 and the surrender provisions of the *Indian Act*. Rather, according to counsel, the surrender provisions are merely a "reasonable expression of the consent required under the Treaty."[178] Second, counsel submits that if there *are* any procedural inconsistencies between the surrender provisions of the 1906 *Indian Act* and those of Treaty 4, the former prevail, according to legal principles reaffirmed by the Supreme Court in *Marshall*.[179] Third, counsel takes the position that there is no compelling extrinsic evidence to support The Key First Nation's allegation that Treaty 4 contemplated a particular process by which consent to surrenders would be obtained.[180]

As referred to earlier in this discussion, we determined in the Kahkewistahaw inquiry that the treaty was not in conflict with the 1906 *Act*. As we stated at that time:

> The treaty does not establish a required level of consent or a means of expressing such consent. Accordingly, the statutory surrender requirements represented a reasonable expression of the consent required under the treaty and, to the extent that those statutory requirements were satisfied, it can be said that the treaty requirements were likewise met.[181]

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[177] Submission on Behalf of the Government of Canada, May 27, 1999, p. 211.

[178] Richard Wex, Senior Counsel, DIAND Legal Services, to Indian Claims Commission, December 14, 1999, p. 3.

[179] Richard Wex, Senior Counsel, DIAND Legal Services, to Indian Claims Commission, December 14, 1999, p. 3.

[180] Richard Wex, Senior Counsel, DIAND Legal Services, to Indian Claims Commission, December 14, 1999, p. 4.

[181] Indian Claims Commission, *Inquiry into the 1907 Reserve Land Surrender Claim of the Kahkewistahaw First Nation* (Ottawa, February 1997), (1998) 8 ICCP 3, n. 176 at p. 70.

In the alternative, we held that, if the standards established by treaty and provided for in the *Act* were inconsistent, the surrender provisions of the *Act* would prevail:

> We agree with Canada that, when the 1906 *Indian Act* was proclaimed, federal legislation could substantively affect or regulate treaty rights to the extent that the legislation evinced a clear intention to modify a treaty right. At the time of the surrender, there was no constitutional restraint to preclude Canada from enacting such legislation since s. 35 of the *Constitution Act, 1982*, which recognizes and affirms existing aboriginal and treaty rights, did not yet exist.[182]

After the close of arguments in this inquiry, however, the Supreme Court of Canada released its decision in *R. v. Marshall*. This case held that extrinsic evidence concerning the historical and cultural context within which a treaty was concluded may be admitted for the purpose of interpreting a treaty right, even where the treaty provision in question is unambiguous. Since the First Nation's original submissions included the argument that the treaty term regarding "consent" to surrenders was to be interpreted with reference to Chief Papequash's oral evidence concerning "clan governance," the parties were given the opportunity to comment on the implications of *Marshall*, if any, to the facts of The Key inquiry. The respective submissions of the parties on this issue have been included in the above discussion, and have been considered by us in the course of making our determination on this issue.

On consideration of all the submissions, and the decision of the Supreme Court in *Marshall*, we have determined that the evidence presented in this case does not support the conclusion put forth by the First Nation – namely, that The Key Band had a treaty right to have decisions regarding the surrender of its reserve made according to its traditions of clan governance.

We take note of the comments of Justice Binnie, writing for the majority in *Marshall*, regarding the duty on the court in construing a treaty:

> The bottom line is the Court's obligation to "choose from among the various possible interpretations of the *common* intention [at the time the treaty was made] the one

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[182] Indian Claims Commission, *Inquiry into the 1907 Reserve Land Surrender Claim of the Kahkewistahaw First Nation* (Ottawa, February 1997), (1998) 8 ICCP 3, n. 176 at p. 70.

> which best reconciles" the Mi'kmaq interests and those of the British Crown (emphasis added) (*Sioui*, per Lamer J, at p. 1069).[183]

Justice Binnie, quoting above from the judgment of Lamer J in *R. v. Sioui,*[184] emphasized the importance of the intention of the parties at the time that the treaty was made. In the present inquiry, we do not have evidence that, *at the time Treaty 4 was made,* all the parties intended to establish within its terms a standard or threshold of consent for the surrender of land. Therefore, as in the Kahkewistahaw inquiry, we conclude that there is no evidence in this case of a conflict between the terms of Treaty 4 and the surrender provisions of the *Indian Act,* and that the challenge to the surrender cannot be upheld on this basis.

ISSUE 2 WAS THE *INDIAN ACT*, RSC 1906, C. 81, COMPLIED WITH?

In particular, did a majority of the male members of The Key Band who were 21 years of age and over assent to the surrender?

Surrender Provisions of the 1906 *Indian Act*

In order for a surrender of Indian reserve land to be valid, it is necessary that the parties comply with the procedural requirements in section 49, which, for ease of reference, we reproduce again:

> **49.** Except as in this part otherwise provided, no release or surrender of a reserve, or a portion of a reserve, held for the use of the Indians of any band, or of any individual Indian, shall be valid or binding, unless the release or surrender shall be assented to by a majority of the male members of the band of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of an officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General.
> 2. No Indian shall be entitled to vote or be present at such council, unless he habitually resides on or near, and is interested in the reserve in question.
> 3. The fact that such release or surrender has been assented to by the band at such council or meeting shall be certified on oath by the Superintendent General, or

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[183] *R. v. Marshall* (1999), 177 DLR (4th), 513 at 526 (SCC), Binnie J.

[184] *R. v. Sioui,* [1990] 1 SCR 1025 at 1069.

> by the officer authorized by him to attend such council or meeting, and by some of the chiefs or principal men present thereat and entitled to vote, before some judge of a superior county or district court, stipendiary magistrate or justice of the peace, or, in the case of reserves in the province of Manitoba, Saskatchewan or Alberta, or the Territories, before the Indian commissioner, and in the case of reserves in British Columbia, before the visiting Indian Superintendent for British Columbia, or, in either case, before some other person or officer specially thereunto authorized by the Governor in Council.
>
> 4. When such assent has been so certified, as aforesaid, such release or surrender shall be submitted to the Governor in Council for acceptance or refusal.[185]

Although compliance with subsections (2), (3), and (4) has been raised by the First Nation and will be dealt with in the context of other issues in this claim, the Band's primary substantive objection to the validity of the surrender lies in the allegation that the procedure by which the surrender was obtained did not comply with the requirements of section 49(1) of the *Act*.

The Supreme Court of Canada has considered the meaning of section 49 of the *Indian Act* in the case of *Cardinal v. R.*[186] In that case, Estey J provided the following summary of the *Act*'s surrender provisions:

> It has also been argued that the interpretation which is now being considered is one which exposes the membership of the band to a risk of loss of property and other rights, contrary to the general pattern and spirit of the *Indian Act*. It is perhaps well to observe in this connection that there are precautions built into the procedures of Pt. I of the Act, dealing with surrender. Firstly, the meeting must be called to consider the question of surrender explicitly. It may not be attended to at a regular meeting or one in respect of which express notice has not been given to the band. Secondly, the meeting must be called in accordance with the rules of the band. Thirdly, the chief or principal men must certify on oath the vote, and that the meeting was properly constituted. Fourthly, only residents of the reserve can vote, by reason of the exclusionary provisions of subs. (2) of s. 49. Fifthly, the meeting must be held in the presence of an officer of the Crown. And sixthly, even if the vote is in the affirmative, the surrender may be accepted or refused by the Governor in Council. It is against this background of precautionary measures that one must examine the

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[185] *Indian Act*, RSC 1906, c. 81, s. 49.

[186] *Cardinal v. R.*, [1982] 1 SCR 508, 13 DLR (4th) 321, [1982] 3 CNLR 3.

> by the officer authorized by him to attend such council or meeting, and by some of the chiefs or principal men present thereat and entitled to vote, before some judge of a superior county or district court, stipendiary magistrate or justice of the peace, or, in the case of reserves in the province of Manitoba, Saskatchewan or Alberta, or the Territories, before the Indian commissioner, and in the case of reserves in British Columbia, before the visiting Indian Superintendent for British Columbia, or, in either case, before some other person or officer specially thereunto authorized by the Governor in Council.
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[185] *Indian Act*, RSC 1906, c. 81, s. 49.

[186] *Cardinal v. R.*, [1982] 1 SCR 508, 13 DLR (4th) 321, [1982] 3 CNLR 3.

This interpretation has been accepted by this Commission in previous inquiries.[190] As a result, if it is found on the facts of this case that the provisions of section 49(1) were not followed, the surrender must be considered void.

In this case, the parties have focused on the first and fourth of the foregoing criteria – namely, the requirement that a meeting be called for the purpose of considering the surrender, and the necessity of a valid majority consent. Although counsel for the First Nation has briefly raised the issue of whether the meeting was summoned in accordance with the rules of the Band, there is no specific evidence before this Commission regarding the existence of any such rules, and, as a result, our analysis will concentrate on the above two factors.

Surrender Meeting

The First Nation submits that there is no evidence of any kind that notice of a surrender meeting was ever given to the Band, nor is there credible evidence that a surrender meeting actually took place. This submission is based on three arguments. First, the First Nation points to the fact that the existing documentation provides scarcely any detail concerning the events that took place at the meeting, and provides no information at all that would indicate whether any notice of the meeting was provided to the Band. Second, the First Nation questions the authenticity of the surrender documents themselves. This objection is based on expert handwriting evidence concerning the appearance of the "X" marks that apparently signified the assent of the band members who signed the documents.[191] Third, counsel argues that the Band has no oral history concerning a surrender meeting. Given the lack of detail concerning the meeting, and the expert's testimony casting doubt on the authenticity of the documents, the First Nation submits that the absence of oral history must lead to a conclusion that no meeting ever took place.

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[190] See ICC, *Inquiry into the 1907 Land Surrender Claim of the Kahkewistahaw First Nation* (Ottawa, February 1997), (1998) 8 ICCP 3 at 68; ICC, *Duncan's First Nation Inquiry Report on: 1928 Surrender Claim* (Ottawa, September 1999), 171.

[191] ICC Transcript, January 25, 1999 (Guy Magny).

In support of its argument that notice of the surrender meeting was not provided to the Band, the First Nation alleges that there exists no evidence in the historical record that *any* notice of any kind was ever provided by any departmental official in advance of the meeting allegedly held on May 18, 1909.[192]

In support of its allegation that no meeting took place, the First Nation points to the lack of a voters' list and to the absence of any minutes of the meeting identifying who was present, recording what was discussed, and tallying the votes for and against the surrender.[193] As part of this argument, it alleges that Inspector Graham's report concerning the surrender[194] contains so little detail that its value as evidence that a meeting took place is minimal. As a result, based on the lack of concrete evidence concerning a surrender meeting on May 18, 1909, counsel invites the Commission to draw an inference that no such meeting took place.

The First Nation further alleges that the surrender documents themselves (consisting of the surrender, Chief The Key's affidavit, and the surrender paylist apparently documenting the advance paid to each band member) cannot be accepted at face value. The objection to those documents as evidence is grounded in the belief that the documents are not "authentic"; in other words, the "X" marks on the documents were not made by the band members themselves, but by some other party, likely Inspector Graham.

In support of this allegation, the First Nation relies on the testimony of its expert witness, Guy Magny. Based on his opinion regarding the significant combination of similarities and the absence of significant differences among the "X" marks on all three documents, Magny concludes that they were all written by the same person. He further concludes that all the "X" marks were likely made by the same person who signed his name "W.M. Graham" on the impugned documents.[195] As Magny's evidence authenticates the "W.M. Graham" signature by comparison with other signatures made by Graham in the ordinary course of business over a six-year period, the First Nation submits that the "X" marks on the documents were made by Graham himself, and not by members of the Band.[196]

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[192] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 1, p. 38.

[193] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 1, p. 81.

[194] W. M. Graham to Department of Indian Affairs, May 21, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Document, p. 481).

[195] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 1, pp. 58–64.

In further support of the argument that the "X" marks are not authentic, the First Nation relies on Magny's observations in light of certain historical departmental instructions to Indian agents regarding the procedures to be followed when a signature was required from an illiterate person. On July 28, 1904, Frank Pedley, the Deputy Superintendent General of Indian Affairs, circulated the following directive to Indian agents in the North-West Territories, which at that time comprised most of western Canada:

> The Department's attention has been drawn to the fact that in some instances when Agents make payments to Indians and issue receipts, which should be signed by mark (the Indian touching the pen), the mark is made when the Indian is not present. According to law a valid receipt cannot be given by an illiterate person unless he touches the pen when "his mark" is being made. Agents are therefore warned that in the future the mark of an Indian must be made by the Indian touching the pen, and the act must be witnessed by a third party, who must sign as witness. Before an Indian makes his mark to a receipt or other document the transaction should be fully explained to him. These instructions apply also to the endorsation [sic] of cheques issued in favour of Indians ...[197]

Magny concludes that, if the above procedure had been followed, the "X" marks on The Key surrender documents would have displayed irregularities and inconsistencies of pressure and movement, instead of the uniformity that is evident on the face of the documents.

As a result of all the above, the First Nation submits that the documents are not authentic. They cannot therefore be relied on in support of a conclusion that a surrender meeting took place in accordance with the requirements of the *Indian Act*.

The final basis for the First Nation's allegation that no meeting was held in accordance with the *Act* concerns the absence of any oral history among the elders of the Band about this event. Counsel for the First Nation refers to numerous examples from the transcript of the community sessions at which various individuals stated their belief that no meeting occurred. These beliefs are founded on the stories of their parents and grandparents to the effect that the surrendered portions of the reserve were taken from them by force or trickery, and not through any orderly process of consent.

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[196] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 1, p. 67.

[197] Frank Pedley to J.H. Gooderham, July 28, 1904 (ICC Exhibit 11).

For example, Elder Edwin Crane commented:

> On that question on that 1909 meeting, I asked the elder here, to his knowledge he was never ever even told about such a meeting, if there was meeting, a public meeting, he said he never recalled anything, never been told about that land loss that we had there. All of a sudden it's gone, that's all he said.[198]

Chief Papequash testified:

> In 1903 to 1909 there were no meetings amongst aboriginal peoples to discuss the land surrender. It was taken by force. ... The land surrender was imposed upon the aboriginal peoples through the dictatorship of the Indian Agent. Under no circumstances would our people ask for a surrender. Because our people at that time didn't, and our people today don't believe in ownership of the land, because it is the land that sustains the lives of the aboriginal peoples and all other races of the world.[199]

Desmond Key stated:

> Well as far back as I can remember I never heard anything about the – what we had surrendered. My grandad never ever mentioned anything to me about surrendering land.[200]

Counsel for the First Nation also argues that there is a notable absence of oral history concerning the alleged payment of the $100 advance to each band member. This absence is significant, in his view, because the receipt of $100 per member would have been a momentous event in the lives of each family, given the value of that amount of money in 1909.[201] In support of this argument, counsel cites evidence such as the following statement by Elder Robert Gordon:

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[198] ICC Transcript, January 24, 1996, p. 37 (Edwin Crane, translated by Lloyd Brass).

[199] ICC Transcript, November 20, 1997, pp. 27–30 (Chief Papequash).

[200] ICC Transcript, March 10, 1998, p. 164 (Desmond Key).

[201] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 1, p. 77.

> No one has ever mentioned getting anything for the land that was taken away from them. ... Well the understanding I got from the old people, that land was taken from them and they never received nothing for it.[202]

As a result, counsel submits that the lack of any historical memory concerning this event among the First Nation's elders is consistent with a theory that no meeting took place.

Canada, in contrast, takes the position that adequate evidence exists from which the Commission can conclude that a valid surrender meeting took place. First, counsel for Canada argues that the Commission may infer from the pre-surrender conduct of the Band that correct procedures were followed by the department in obtaining the surrender. In particular, counsel points to the evidence that the Band itself requested the surrender in July 1908,[203] that a pre-surrender meeting took place in January 1909,[204] and that the Band subsequently requested that the surrender be taken before ploughing was to begin in the spring of 1909.[205] As well, the evidence indicates that Canada intended to comply with its obligations regarding the procedures to be followed, as demonstrated by the fact that Inspector Graham was specifically instructed to take the surrender in accordance with the provisions of the *Indian Act*.[206]

Second, Canada finds support for its position in the fact that the surrender document was apparently signed, by mark or actual signature, by seven individuals.[207] Counsel also relies on the affidavit of Chief The Key[208] attesting to the fact of the meeting, and on the reporting letter of

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[202] ICC Transcript, March 10, 1998, pp. 177–80 (Ronald Gordon).

[203] W.G. Blewett to Department of Indian Affairs, July 24, 1908, NA, RG 10, vol. 4039, file 329759 (ICC Documents, p. 454).

[204] W.M. Graham to Frank Pedley, January 21, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, pp. 460–62).

[205] W.G. Blewett to J.D. McLean, April 21, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, p. 469).

[206] Frank Pedley to W.M. Graham, February 13, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, p. 466).

[207] "Surrender of Key I.R. No. 65," May 18, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, pp. 476–79).

[208] "Affidavit of William M. Graham and The Key," May 19, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, p. 479).

Inspector Graham[209] to the same effect. Third, Canada submits that the post-surrender conduct of the Band – including requests for sale proceeds, the subsequent surrender of a parcel of reserve land for church purposes, and the lack of any contemporary objection to the 1909 surrender – is consistent with a theory that the correct procedures were followed and that the surrender was not obtained by trickery or deceit.

Fourth, Canada questions the evidentiary value of the oral history provided to the Commission at the community sessions. Counsel contends that the oral history provided in this case does not fit the definition of "oral history evidence" contemplated by the Supreme Court of Canada in *Delgamuukw v. British Columbia.*[210] It is argued that the Court referred to oral history evidence as the "sacred official litany, or recital of the most important laws, history, traditions" of a claimant which were "repeated, performed, and authenticated at important feasts."[211] Counsel for Canada submits that the Court intended that there be considerable formality and solemnity attached to such evidence:

> By way of content, oral history involves the recital of sweeping history over a lengthy time period – it does not involve whether certain statutory requirements were met in respect of a single transaction.[212]

In the alternative, Canada submits that, if the elders' statements are found to be "oral history evidence," with the result that they are admissible on an equal footing with other forms of evidence, they should be critically evaluated in order to determine their proper weight. In this context, counsel argues that a critical review of the oral history evidence tendered by The Key First Nation leads to the conclusion that the evidence in question contains too many inconsistencies and contradictions to be given much weight in the determination of the factual issues in this claim.

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[209] W.M. Graham, Inspector of Indian Agencies, to Department of Indian Affairs, May 21, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, p. 481).

[210] *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010.

[211] Submission on Behalf of the Government of Canada, May 27, 1999, p. 32, citing: *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 at 1072.

[212] Submission on Behalf of the Government of Canada, May 27, 1999, p. 32.

In support of this submission, counsel for Canada notes that a number of elders declared that they did not know about the events leading up to the 1909 surrender or whether a meeting took place.[213] For example, he refers to the evidence of Raymond Brass, who stated:

> I don't really know a thing about the surrender. Its just stories that I've heard ... I don't really know a thing about the surrender. Its just little bits here and there that I've heard. [214]

Counsel for Canada also refers to excerpts from the evidence of Charles Cochrane, Edwin Crane, William Papequash, Desmond Key, Helen Stevenson, and others to the same effect.[215]

In addition, counsel submits that the evidence of various band informants is inconsistent on the issue of the literacy of The Key band members at the time of the surrender,[216] and on other issues conflicts directly with documentary evidence on the record, including evidence not challenged by the Band's counsel.[217] As a result, he submits that the oral history should not outweigh the documentary evidence in the determination of the issues in this case.

Finally, Canada challenges the testimony offered by the First Nation's handwriting expert. Although counsel for Canada takes issue with the correctness of some of Mr Magny's conclusions, in particular whether the "X" on Chief The Key's affidavit was also made by the same person who placed all the "X" marks on the surrender document, counsel's main objection to this testimony is based on its relevance.[218]

Canada submits that, even if every "X'" on the surrender document was placed there by one person, instead of by the individual members of the Band, that fact is legally irrelevant, since there is no legal requirement that *any* band members sign the surrender document.[219] Furthermore, counsel submits that it is a longstanding principle of law that an illiterate person can validly "sign" a document if he authorizes another to sign it in his name or by a mark.[220] Therefore, even if all the marks were made by Inspector Graham, as Magny alleges, that fact *by itself* is not legally significant in the view of the counsel for Canada, since it is possible that band members authorized Graham to make the marks in question.[221]

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[213] Submission on Behalf of the Government of Canada, May 27, 1999, p. 34.

[214] ICC Transcript, January 24, 1996 (ICC Exhibit 2, p. 7) (Raymond Brass).

[215] Submission on Behalf of the Government of Canada, May 27, 1999, pp. 35–36.

[216] Submission on Behalf of the Government of Canada, May 27, 1999, pp. 37–38.

[217] Submission on Behalf of the Government of Canada, May 27, 1999, pp. 36–39.

[218] The Crown has made its submissions regarding the expert testimony in connection with criterion 4 – "Majority Assent"; however, as the First Nation has raised this issue in connection with criterion 1, the Crown's position will be discussed at this point.

Canada further submits that there is no legal or statutory requirement that Indian agents comply with the 1904 departmental directive regarding "touching the pen"[222] to validate documents signed by mark. As a result, according to counsel, Magny's testimony that the directive could not have been complied with in this case is of no significance.[223]

In conclusion, counsel for Canada submits that there exists sufficient evidence on the record to clearly establish that a surrender meeting took place on May 18, 1909.

As the evidence with respect to the surrender meeting is intertwined with the evidence relevant to the question of majority assent, the findings of the Commission on both points will be discussed together, following our review of the parties' positions on the latter issue.

Majority Assent

As indicated previously,[224] the Supreme Court of Canada in *Cardinal* has interpreted "majority assent" within section 49(1) of the *Indian Act* to mean that a majority of the male band members of the full age of 21 years must attend the surrender meeting, and that a majority of those in attendance must in turn assent to the surrender.

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[219] Submission on Behalf of the Government of Canada, May 27, 1999, p. 45.

[220] Submission on Behalf of the Government of Canada, May 27, 1999, p. 46, citing *London County Council v. Agricultural Food Products*, [1952] 2 All ER 229 (CA).

[221] Submission on Behalf of the Government of Canada, May 27, 1999, pp. 46–47.

[222] Departmental Circular of Frank Pedley, DSGIA, to J.H. Gooderham, Indian Agent, July 28, 1904 (ICC Exhibit 11).

[223] Inquiry into the Matter of The Key First Nation regarding the 1909 Surrender Claim: Oral Submissions, June 14, 1999, pp. 160–61.

[224] *Cardinal v. The Queen*, [1982] 1 SCR 508, 13 DLR (4th) 321, [1982] 3 CNLR 3.

The First Nation takes the position that there exists no reliable evidence that the "double majority" referred to by Estey J was met in the present case. With respect to the first majority – namely, that a majority of eligible voters in the Band attend the surrender meeting – counsel relies on a report prepared by Lockhart and Associates[225] for this inquiry at the First Nation's request. The authors of this report conclude that there were 18 eligible voters at the time of the surrender, of whom ten would constitute a majority. Counsel for the First Nation states that the only documentary evidence concerning attendance at the meeting is Inspector Graham's letter of May 21, 1909. This letter, in which Graham reported that "nearly all the members of the Band were present,"[226] is ambiguous, in counsel's view, since it is not possible to determine the age or genders of the members who attended. Therefore, it is submitted that there is no proof that the required majority of eligible male voters attended.[227]

The second majority referred to in the judgment of the Supreme Court in *Cardinal* concerns the requirement that a majority of voters in attendance at the meeting vote in favour of the surrender. Counsel for the First Nation argues that, although Graham's reporting letter states that the "vote was unanimous,"[228] it cannot be determined if the second majority was met in this case because it is not known how many eligible voters attended the meeting.[229]

Counsel for the First Nation also finds it significant that the surrender document itself was marked or signed by only seven band members, given Inspector Graham's comments that the vote had been unanimous. Counsel argues that, if a proper majority of at least ten voters had attended (out of the 18 considered eligible by Lockhart and Associates), it would be expected that all of them would have marked or signed the document.[230]

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[225] "Those Eligible to Vote in the Alleged Surrender of The Key Reserve May 18, 1909," Lockhart and Associates, January 31, 1997 (ICC Exhibit 9).

[226] W.M. Graham to Department of Indian Affairs, May 21, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, p. 481).

[227] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 1, pp. 89–90.

[228] W.M. Graham to Department of Indian Affairs, May 21, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, p. 481).

[229] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 1, pp. 91– 92.

[230] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 1, pp. 92– 95.

As well, the First Nation points out that the surrender paylists of May 18, 1909, indicate that at least 14, and possibly as many as 17, males over the age of 21 years received their $100 advance on the day of the surrender. Assuming for the sake of the argument that the paylists are authentic, counsel submits that, if all these individuals attended the surrender meeting as well, it might be expected that this majority would have signed the surrender document. Therefore, he finds it suspicious that only seven signed or made their mark and, accordingly, he invites the Commission to infer that the majority requirement was not met.[231]

For its part, Canada submits that the historical documents created at the time of the surrender should be accepted at face value as proof that both majorities were met.

In support of his argument that the "first majority" required by the *Indian Act* was attained, counsel for Canada relies on the surrender affidavit of Chief The Key and Inspector Graham.[232] It attests to the fact that a majority of eligible voters was in attendance at the surrender meeting. He also relies on Graham's reporting letter,[233] which states that "nearly all the members of the Band were present" at the surrender meeting, and finds further support in the surrender paylist,[234] which indicates that at least 14 eligible voters were present on that day to receive their advance.

Counsel for Canada also relies on the above affidavit and reporting letter in support of his position that the "second majority" was attained. Specifically, he states that Graham's report that the "vote was unanimous" is the best evidence that a majority of voters present at the meeting voted in favour.

With respect to the First Nation's argument that non-compliance with the *Act* can be inferred from the fact that only seven voters signed or marked the surrender document, counsel for Canada points out that there exists no legal requirement that *any* voters sign the surrender document. He also argues, for reasons discussed earlier, that the expert witness's conclusion regarding the author of the

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[231] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 1, pp. 96– 97.

[232] "Surrender Affidavit," Chief of The Key Band of Indians, May 19, 1909 (ICC Documents p. 479).

[233] W.M. Graham to Department of Indian Affairs, May 21, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents 481).

[234] The Key Band Paylist, May 18, 1909, NA, RG 10, vol. 9845 (ICC Exhibit 8A, and K2 (1 to 5)).

"X" marks is legally irrelevant to the issue of consent, since the voters could have authorized anyone, including Inspector Graham, to make the marks on their behalf.[235]

Finally, Canada submits that the Band's conduct following the surrender is consistent with a conclusion that the correct procedures were followed in obtaining the surrender. As discussed earlier, counsel points out that there is no record of any contemporaneous objection to the surrender on the part of the Band. Relying on the statement of Campbell J in *Chippewas of Sarnia Band v. Canada (Attorney General)*[236] to the effect that knowledge of a surrender, together with a failure to complain, may provide evidence of consent to the surrender, counsel submits that the Commission may infer that consent was given in this case.[237]

Compliance with Section 49(1) of the *Indian Act*

As alleged by the First Nation and conceded by Canada, this surrender was sparsely documented. The documents that *do* exist are a surrender document marked or signed by seven individuals, the affidavit of Chief The Key and Inspector Graham, and a brief report by Inspector Graham. Each of these documents, on its face, attests to the fact that a surrender meeting was held. The affidavit of the Chief and Inspector Graham attests to the fact that a majority of eligible voters assented to the surrender.[238] Inspector Graham's report states that "nearly all" the band members attended the surrender meeting and that the vote was "unanimous."[239]

The Band submits that, given the scarcity of information concerning the surrender, the existing documents cannot be taken at face value in light of two factors: the expert evidence casting doubt on the authenticity of the "X" marks on the surrender, and the lack of any mention of the surrender in The Key First Nation's oral history .

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[235] Submission on Behalf of the Government of Canada, May 27, 1999, p. 53.

[236] *Chippewas of Sarnia Band v. Canada (Attorney General)*, [1999] OJ No. 1406, Court File No. 95-CU-92484 at paragraph 220.

[237] Oral Submissions, June 14, 1999, p. 141.

[238] Affidavit of William M. Graham and The Key, May 19, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, p. 479).

[239] W. M. Graham to Department of Indian Affairs, May 21, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, p. 481).

With respect to the testimony of handwriting expert Guy Magny, we do not propose to engage in a substantive discussion concerning his qualifications or methodology, or the substantive bases for his conclusions. Rather, it appears clear to us that, even if we accept all his conclusions – that all the "X" marks on the document were made by Inspector Graham – his testimony cannot determine whether band members authorized Graham to make the marks on their behalf. As correctly pointed out by counsel for Canada, the *Indian Act* does not mandate that the surrender document be signed or marked by those voting in favour. Further, at common law, a person may validly execute a document by authorizing another to sign or mark it on his behalf. Therefore, Magny's testimony is not relevant to the issue of compliance with the procedural requirements of section 49(1) of the *Indian Act,* since the *Act* does not require that the eligible voters personally sign or mark the surrender document. As a result, Magny's testimony does not support the First Nation's allegation that a surrender meeting was not held, nor does it assist its contention that a proper majority was not attained.

Parenthetically, we might add that one aspect of Magny's testimony may have had the unintended effect of supporting Canada's submission that the proper procedures *were* followed. From Magny's report, it appears that the signatures of "Peter O'Soup" and "Charles Thomas," the two band members who apparently signed the surrender document, "revealed a significant combination of similarities and no significant differences"[240] when compared with the specimen signatures of those two individuals taken from later documents. Given that there has been no allegation, or any evidence, that these individuals were involved in any irregularities in the procurement of the surrender, we find that the authentication of these signatures is evidence in favour of the surrender's validity.

Turning to the oral history evidence, we are mindful of the decision of the Supreme Court in *Delgamuukw v. British Columbia*[241] in which Chief Justice Lamer stated:

> Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of

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[240] Guy Magny, "Forensic Handwriting & Document Examination Report," July 8, 1998 (ICC Exhibit 8A), p. 9.

[241] *Delgamuukw v. British Columbia,* [1997] 3 SCR 1010.

> evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents.[242]

Although the Commission accepts and has applied the above principle in prior inquiries, we also take the view that the "equal footing" referred to by the Chief Justice does not amount to special status, nor does it have the effect of assigning greater weight to oral history than to any other evidence. Accordingly, any oral evidence submitted in this inquiry will be weighed and considered along with all the other evidence in our determination of this issue.

In the present inquiry, the First Nation submits that the lack of oral history concerning the surrender meeting must lead to the conclusion that the event never took place. We do not accept the principle that the absence of oral history evidence of necessity leads to this conclusion. Further, we have difficulty in accepting the notion that an *absence* of evidence, including oral history evidence, can fulfil the obligation on a claimant to make its case in accordance with the Specific Claims Policy. As we stated in the Moosomin inquiry:

> The general principle with respect to the burden of proof and onus is that the First Nation, as the claimant, bears the burden of proving that the Crown has breached its lawful obligations.[243]

In making the above determination, we are not criticizing in any way the evidence given by the elders at the community sessions. It is not in the least unexpected that the elders would not have information concerning an event which, in most cases, took place before they were born. Nor are we suggesting that the band members on whose information they relied were not telling the truth. Rather, we hold that the absence of oral history evidence is not determinative of the issue of compliance with the procedural requirements of the *Indian Act*, and that we must examine all the evidence submitted in the inquiry before we can reach any conclusion on the issue.

We are mindful of the scarcity of evidence regarding the surrender meeting itself, which is a situation that causes us some concern. As a result, we must determine from other evidence on the record in this inquiry whether the procedural requirements of the *Indian Act*, in particular the requirement of majority consent, were met in this case. We find support for this approach in the guiding principle governing the determination of a surrender's validity articulated by Justice Gonthier in *Apsassin v. The Queen:*

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[242] *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 at 1069, Lamer CJ.

[243] ICC, *Inquiry into the 1909 Reserve Land Surrender Claim of the Moosomin First Nation* (Ottawa, March 1997), (1998) 8 ICCP 101 at 202.

> An intention-based approach offers a significant advantage, in my view. As McLachlin J. observes, the law treats aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured. It is therefore preferable to rely on the understanding of the Band members in 1945, as opposed to concluding that regardless of their intention, good fortune in the guise of technical land transfer rules and procedures rendered the 1945 surrender of mineral rights null and void ... In my view, when determining the legal effect of dealings between aboriginal peoples and the Crown relating to reserve lands, the *sui generis* nature of aboriginal title requires courts to go beyond the usual restrictions imposed by the common law, in order to give effect to the true purpose of the dealings.[244]

In the above case, Justice Gonthier noted that the Band had known for some time that an absolute surrender of the reserve was contemplated, and he found that fact relevant in determining the band members' intention when they agreed to the surrender.

Similarly, the trial judge in *Chippewas of Sarnia Band v. Canada (Attorney General)* stated that a failure on the part of band members to complain *after* a surrender was taken could, in some circumstances, be evidence of consent:

> Although knowledge is not consent it may, in some cases, when coupled with lack of complaint, provide some evidence of consent or agreement.[245]

The above approach is consistent with principles developed in the general law of contract to the effect that the *existence* of a legally binding contract may be inferred from the subsequent conduct of the parties, even in circumstances where there exists an imperfect written instrument that one party seeks to disavow.[246] As a result of all the foregoing, we have taken note of documentary evidence concerning events that both preceded and followed the surrender in making our determination of the surrender's validity.

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[244] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25, 130 DLR (4th) 193 at 358 (SCR) 358–59.

[245] *Chippewas of Sarnia Band v. Canada (Attorney General)*, [1999] OJ No. 1406 at paragraph 220 (Ontario Superior Court of Justice).

As pointed out by counsel for Canada, it appears that the Band requested the surrender in July 1908,[247] and that it subsequently requested that the surrender be taken before ploughing was to begin in the spring of 1909.[248] Further, the First Nation does not dispute that a pre-surrender meeting took place in January 1909, at which the Band, on the one hand, and Inspector Graham, representing the department, on the other, apparently agreed to new terms of surrender.[249]

As well, a number of significant events took place after the surrender. The paylist dated May 18, 1909,[250] indicates that each band member was paid $100 in fulfilment of one of the terms of the surrender. While it is true that the First Nation has challenged the authenticity of this document, based on handwriting expert Guy Magny's testimony that the "X" marks were not made by band members, we stand by our earlier conclusion that we do not find Magny's testimony to be relevant to the issue of the authenticity of the documents, since it is possible that band members authorized Inspector Graham to make the marks on their behalf.

Of equal significance is the evidence that band members conducted themselves long after the surrender in a manner consistent with the theory that the correct procedural requirements of the *Indian Act*, including a meeting and consent by the proper majority, had been followed. For example, more than a year after the 1909 surrender, the Band surrendered another parcel of its reserve land for sale to the Church of England.[251] As well, the land surrendered in 1909 that remained unsold after the first auction was offered for sale again on June 7, 1911. Later that month, Chief The Key approached the agent inquiring when band members could expect interest money generated from the sale.[252] An interest payment of $10 per capita was paid to band members in January 1913,[253] followed by a further distribution of interest funds in January 1914.[254]

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[246] *DiGiacomo v. DiGiacomo Canada Inc. et al.* (1989), 28 CPR (3d) 77 at 85 (Ontario High Court of Justice).

[247] W.G. Blewett to Department of Indian Affairs, July 24, 1908, NA, RG 10, vol. 4039, file 329759 (ICC Documents, p. 454).

[248] W.G. Blewett to J.D. McLean, April 21, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, p. 469).

[249] W.M. Graham to Frank Pedley, January 21, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, pp. 460–62).

[250] Paylist: "Key Band, May 18th 1909," NA, RG 10, vol. 9845 (ICC Exhibit 8A, Document K-2 (1 to 5).

[251] Surrender, The Key Band of Indians, December 13, 1910 (ICC Documents, pp. 501–03).

We have discussed the post-surrender conduct of the Band in some detail, because, of necessity in our view, it assumes greater importance in circumstances where the evidence surrounding the surrender itself is scarce or equivocal. Although we are not satisfied with the lack of evidence concerning events on the day of the surrender, we conclude that, in this case, the post-surrender conduct is consistent with the theory that all the proper surrender procedures were followed. Therefore, based on all the evidence, including the Band's actions in pursuing the surrender, the existence of two apparently authentic signatures on the surrender document, and the post-surrender conduct of the Band, we conclude that the First Nation has not discharged the general burden upon it to establish that Canada did not comply with the surrender procedures of the *Indian Act*.

ISSUE 3 WERE THE SHOAL RIVER INDIANS MEMBERS OF THE KEY BAND in 1909?

Were the Shoal River Indians members of The Key Band at the time of the surrender in 1909, and, if so, were they entitled to vote on the surrender?

Membership and Eligibility to Vote

Because the surrender provisions of the *Indian Act* require that a majority of male members of the Band over the age of 21 attend any surrender meeting, it becomes important to determine whether the Shoal River Indians were members of The Key Band at the date of the surrender. As it appears from the historical evidence that the Shoal River Indians were followers of Chief The Key at one time, it must therefore be determined whether they achieved autonomy as a band prior to the date of surrender. If they did, then they would not have been members of The Key Band and, accordingly, would not have had any right to attend the surrender meeting or vote on the surrender. If they did not constitute a separate band by the relevant date (and were therefore members of The Key Band), then it is necessary to determine whether they were habitually resident on or near, and interested in, the reserve within the meaning of section 49(2) of the *Act*, since the latter requirement will further determine their eligibility to vote on the surrender. If they *were* eligible to vote according to the provisions of the *Act*, then the surrender is void, since it is not in dispute that they did not attend the surrender meeting or vote on the surrender. The addition of their numbers to the eligible voting population would mean that the *Act*'s majority voting requirements were not met.

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[252] A. A. Crawford to the Secretary, Department of Indian Affairs, June 28, 1911 (ICC Documents, p. 508).

[253] Indian Agent, Kamsack, to the Secretary, Department of Indian Affairs, January 28, 1913 (ICC Documents, p. 516).

[254] W.G. Blewett to the Secretary, Department of Indian Affairs, January 12, 1914 (ICC Documents, pp. 526–27).

Autonomy

The First Nation takes the position that the Shoal River Indians were "simply members of The Key Band who may not have resided on the Reserve," and that representatives of the department improperly excluded them from voting on the surrender.[255] In support of this argument, counsel for the First Nation relies on several factors which, in his view, constitute evidence that the Shoal River Indians and the followers of Chief The Key at Pelly were in fact one band for the purposes of the *Indian Act*.

First, counsel finds it significant that IR 65 was surveyed to include 38 square miles, which, under the terms of Treaty 4, was approximately sufficient for both groups. He also states that, for many years, the department refused to give the Shoal River Indians their own reserve and expected them to relocate to Pelly.[256] As well, when reserve land was finally set aside at Shoal River, several of the orders in council establishing the reserves referred to the land as having been surveyed for "the Band of Chief 'The Key'"[257] and "The Key Band."[258] Counsel states that the division of the Band into two separate paylists in 1902 was an administrative convenience for the department, and not an acknowledgment of the Shoal River Indians' autonomy as a band. He finds support for this argument in the view of Inspector Graham, who appeared to believe that an "order of the Department" was required to separate the original band into two autonomous bands.[259]

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[255] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 1, p. 97.

[256] L.W. Herchmer to Indian Commissioner, October 10, 1882, NA, RG 10, vol. 7770, file 27117-2 (ICC Documents, p. 111); L.W. Herchmer to Indian Commissioner, May 6, 1885, NA, RG 10, vol. 3575, file 215 (ICC Documents, pp. 142–45).

[257] Order in Council, July 20, 1895, NA, RG 10, vol. 3575, file 215 (ICC Documents, p. 278).

[258] Order in Council, PC 8863, September 30, 1895 (ICC Documents, pp. 282–85).

Canada takes the opposite position on this issue and submits that, from at least 1882, The Key Band and the Shoal River Indians were two separate bands for the purposes of the *Indian Act*.[260] In support of this conclusion, counsel relies on the fact that the Shoal River Indians did not follow Chief The Key to the new reserve at Pelly in 1881, but instead requested that the department give them reserve land and pay them their annuities at Shoal River.[261] Counsel further points out that the Shoal River Indians petitioned the department for their own reserve at least three times: in 1882,[262] in 1884,[263] and in 1885.[264] He argues that, on these occasions, the Shoal River Indians repeated their desire to remain where they were, repudiated the leadership of Chief The Key, and disavowed any interest in the new reserve at Pelly.[265]

Counsel also states that the two groups differed ethnically, lived 90 miles apart, and pursued different economic livelihoods. He points out that, in 1893, the Shoal River Indians were granted the use of a number of reserves around Shoal River. In 1902, the department placed the Shoal River Indians on a separate paylist entitled "Shoal River Band paid at Shoal River Reserve" and transferred responsibility for them to the Lake Manitoba Inspectorate, actions that, Canada submits, amounted to official recognition of their status as a separate band. Canada also submits that The Key Band at Pelly viewed itself as politically distinct from the members of the Shoal River group, as evidenced by the fact that the latter were not included in discussions concerning the 1903 surrender, and were expressly excluded by The Key Band from any participation in the 1909 surrender discussions.[266] Counsel for Canada also points out that evidence from First Nation member William Papequash presented at the March 10, 1998, community session supports its submission that the two groups were autonomous by 1909:

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[259] W. M. Graham to Secretary, Department of Indian Affairs, August 13, 1908, NA, RG 10, vol. 4039, file 329759 (ICC Documents, pp. 455–56).

[260] Submission on Behalf of the Government of Canada, May 27, 1999, p. 54, citing "Research Memorandum regarding the Establishment of the Shoal River Band, Manitoba, and Its Relationship to The Key's Band, Saskatchewan," November 1998 (ICC Exhibit 13).

[261] Submission on Behalf of the Government of Canada, May 27, 1999, p. 56.

[262] John Beardie, Headman [and 17 others], Shoal River, to Indian Agent, Treaty 4, August 26, 1882, NA, RG 10, vol. 7770, file 27117-2 (ICC Documents, pp. 109–10).

[263] John Beardie et al. to L. Vankoughnet, January 1, 1884, NA, RG 10, vol. 7770, file 27117-2 (ICC Documents, pp. 127–30).

[264] John Beardie, Headman [and one other], to E. McColl, Inspector of Indian Agencies, February 20, 1885, NA, RG 10, vol. 3575, file 215 (ICC Documents, pp. 138–41).

[265] Submission on Behalf of the Government of Canada, May 27, 1999, pp. 56–57.

> Q. Do you know if they got involved with each other's band councils ... did they ... get involved politically between the two bands?
>
> A. Not that I can remember, like you could always tell them apart ... But no, I don't think ... they got together politically.[267]

Counsel for Canada refers to the decision of this Commission in the Young Chipeewayan inquiry, in which we stated that a "band" within the meaning of the *Indian Act* refers to a body of Indians who live as a "collective community" under the legislative scheme established by the *Act*. Based on the foregoing evidence, he submits that the followers of Chief The Key at Pelly and the Shoal River Indians did not exist as a "collective community" at the time of the 1909 surrender. As a result, counsel submits that the Shoal River Indians were an autonomous band and did not have the right to attend the surrender meeting or vote on the surrender of part of IR 65.

The Commission notes that the *Indian Act* of the day did not provide for the division of one band into two separate and autonomous bands. Rather, since 1876, the *Act* has defined a "band" as

> ... any tribe, band or body of Indians who own or are interested in a reserve or in Indian lands in common, of which the legal title is vested in the Crown, or who share alike in the distribution of any annuities or interest moneys for which the Government of Canada is responsible ...[268]

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[266] Submission on Behalf of the Government of Canada, May 27, 1999, pp. 58–59.

[267] Submission on Behalf of the Government of Canada, May 27, 1999, p. 60, citing ICC Community Session, March 10, 1998, pp. 156–57 (William Papequash) (Exhibit 3).

[268] *Indian Act*, RSC 1876, c. 18, as amended.

We have had occasion to comment on this definition in the Young Chipeewayan inquiry,[269] in which we stated:

> In our view the term "band" within the meaning of the *Indian Act* clearly refers to a body of Indians who live as a collective community under the auspices of that legislation.[270]

We are impressed in this case by the evidence indicating that the two groups – the followers of Chief The Key at Pelly and the Shoal River Indians – repeatedly communicated their intention to live separately as autonomous entities. As early as 1882, the Shoal River group presented a petition to the Indian Agent in which they repudiated the leadership of Chief The Key, disavowed any interest in IR 65, and requested that they be given their own reserve at Shoal River.[271] Similar petitions from this group were forwarded to officials of the department in 1884 and 1885.[272] The evidence also indicates that, by January 1909 at the latest, the followers of Chief The Key did not consider the Shoal River Indians to be "shareholders in their Reserve" and were "quite contented to relinquish any claim they may have to the Shoal River Reserve."[273]

The Department of Indian Affairs separated the two groups administratively in 1902, placing the Shoal River Indians on a separate paylist, paying them annuities in their community, and transferring responsibility for them to the Lake Manitoba Inspectorate. While this administrative action is significant, it is not in our view determinative. Rather, it appears to us that it is the intention of the band, or of the groups within a band, that must take priority in determining whether a single "band" separated into two autonomous "bands" within the meaning of the *Indian Act*.

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[269] ICC, *The Young Chipeewayan Inquiry into the Claim regarding Stoney Knoll Indian Reserve No. 107* (Ottawa, December 1994), (1995) 3 ICCP 175.

[270] ICC, *The Young Chipeewayan Inquiry into the Claim regarding Stoney Knoll Indian Reserve No. 107* (Ottawa, December 1994), (1995) 3 ICCP 175 at 198.

[271] John Beardie, Headman [and 17 others], to Indian Agent, Treaty No. 4, August 26, 1882, NA, RG 10, vol. 7770, file 27117-2 (ICC Documents, pp. 109–10).

[272] John Beardie et al. to L. Vankoughnet, January 1, 1884, NA, RG 10, vol. 7770, file 27227-2 (ICC Documents, pp. 127–30); John Beardie, Headman [and one other], to E. McColl, February 20, 1885, NA, RG 10, vol. 3575, file 215 (ICC Documents, pp. 138–41).

[273] W.M. Graham to Frank Pedley, January 21, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, pp. 460–62).

In light of the above evidence, especially the evidence relating to the mutual intention of the two groups to live as autonomous entities, it cannot be said that the Shoal River Indians and the followers of Chief The Key constituted a "collective community" of the kind contemplated in our previous decision in the Young Chipeewayan inquiry. As a result, we hold that the two groups were not one "band" for the purposes of the *Indian Act*.

In the event that we are wrong and that the two groups *were* one band for the purposes of the *Indian Act,* we will make a further determination regarding the eligibility of the Shoal River Indians to vote on a surrender pursuant to the residency requirements of the *Act*.

Habitual Residence

As we have seen, the *Indian Act* permits only those band members who habitually reside on or near, and are interested in, the reserve in question to vote on its surrender.

The First Nation has not made any arguments with respect to the habitual residence of the Shoal River Indians, other than the general statement that the latter were improperly excluded from the surrender vote.[274] Canada, however, has made several arguments in support of its position that the Shoal River Indians were precluded from voting on the surrender because they were not habitually resident on or near the reserve, as required by the *Act*.

In Canada's view, the evidence clearly indicates that none of the Shoal River Indians lived "on" The Key Reserve, and, as a result, the only issue is whether they lived "near" it, within the meaning of the *Act*. Although this provision of the *Indian Act* has not been interpreted by the courts, counsel for Canada argues that "near" is a relative term and must be interpreted according to the particular circumstances of the case. In this case, according to counsel, the circumstances in question include "the lifestyle of the band members, the distances travelled by band members in accordance with this lifestyle, reliance by the Indians on the reserve in question for economic, social, or other purposes as well as the need to ensure an efficient means for a band to be able to surrender its reserve land."[275]

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[274] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 1, p. 97.

[275] Submissions on Behalf of the Government of Canada, May 27, 1999, pp. 66–67.

Applying these principles, counsel submits that the evidence establishes that the Shoal River group did not reside "near" The Key reserve within the meaning of the *Indian Act*. His reasons in support of this finding include the fact that the lifestyle of the Shoal River Indians was largely centred around fishing in the Shoal River area, and that there is no evidence that they pursued their hunting and fishing lifestyle by travelling distances equal to the distance between their reserves and The Key reserve. Counsel also states that prior to the department's 1902 decision to pay annuities to the group at Shoal River, members of that group repeatedly complained about having to travel to The Key reserve for their payments. Moreover, they did not rely on The Key reserve for social, economic, or any other purpose by the time of the 1909 surrender.[276]

Based on the above evidence, it appears clear to this Commission that the Shoal River Indians did not have the right to vote on the 1909 surrender pursuant to section 49(2) of the *Indian Act*, which states:

> **49(2).** No Indian shall be entitled to vote or be present at such council, unless he habitually resides on or near, and is interested in the reserve in question.[277]

After an examination of various judicial authorities, we commented on the meaning of the term "habitually resides" in the recent Duncan's First Nation inquiry.[278] We concluded:

> In summary, we take from these authorities that an individual's "habitual" place of residence will be the location to which that individual customarily or usually returns with a sufficient degree of continuity to be properly described as settled, and will not cease to be habitual despite "temporary or occasional or casual absences."... such residence entails "a regular physical presence which must endure for some time ..."[279]

In the above inquiry, we also discussed the meaning of the word "near" within the context of section 49(2) of the *Act*. We determined that the concept was a relative one, to be decided on a case-by-case basis, having regard, among other things, to the general use of the reserve and the residence patterns of the band members.[280]

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[276] Submissions on Behalf of the Government of Canada, May 27, 1999, p. 67.

[277] *Indian Act*, RSC 1906, c. 81, s. 49(2).

[278] ICC, *Duncan's First Nation Inquiry Report On: 1928 Surrender Claim*(Ottawa, September 1999).

[279] ICC, *Duncan's First Nation Inquiry Report on: 1928 Surrender Claim* (Ottawa, September 1999), 131.

The evidence in this inquiry clearly establishes that the Shoal River Indians never lived on IR 65, that until 1902 they travelled there only once a year to collect their annuities, and that after 1902 they made no use of the reserve at all. Furthermore, although the parties did not argue the point, we find it difficult to see how the Shoal River Indians can be considered to have been "interested in" IR 65 at the time of the surrender, having repeatedly disavowed any interest in it from 1882 forward.

Therefore, as a result of all the above, we have determined that the Shoal River Indians were not entitled to vote on the surrender because they did not reside on or near, and were not interested in, IR 65 at the relevant time.

ISSUE 4 DID CANADA BREACH ITS FIDUCIARY OBLIGATIONS TO THE KEY BAND?

Did Canada have any pre-surrender fiduciary obligations to The Key Band and, if so, did Canada fulfil or did Canada breach any such fiduciary obligations with respect to the surrender of 1909?

In particular, was the surrender obtained as a result of undue influence or misrepresentation?

Nature of the Pre-surrender Fiduciary Duty

In several of its prior inquiries involving allegedly wrongful surrenders, and most recently in the Duncan's First Nation claim,[281] the Commission has conducted extensive examinations of the legal authorities governing the fiduciary obligations of the Crown before the taking of a surrender of reserve land. Although this analysis will not be repeated in detail, it is useful to highlight the principles that have evolved from the courts' consideration of the above issue.

Beginning with the decision of the Supreme Court of Canada in *Guerin v. The Queen*, which established the principle that the Crown stands in a fiduciary relationship with aboriginal peoples, Canada has been required to conduct itself according to a strict standard of conduct when a surrender of reserve land is obtained. As we stated in our report concerning the land surrender claim of the Kahkewistahaw First Nation:

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[280] ICC, *Duncan's First Nation Inquiry Report on: 1928 Surrender Claim* (Ottawa, September 1999), 136.

[281] ICC, *Duncan's First Nation Inquiry Report on: 1928 Surrender Inquiry* (Ottawa, September 1999).

> The *Guerin* case is instructive for two reasons: first, it determined that the relationship between the Crown and First Nations is fiduciary in nature; second, it clearly established the principle that an enforceable fiduciary obligation will arise in relation to the sale or lease of reserve land by the Crown on behalf of, and for the benefit of, a band to a third party *following* the surrender of reserve land to the Crown in trust. However, the Supreme Court of Canada was not called upon in *Guerin* to address the question whether the Crown owed any fiduciary duties to the band *prior to* the surrender. That issue was not specifically addressed until *Apsassin* appeared on the Court's docket.[282]

The decision of the Supreme Court in *Apsassin v. The Queen*[283] not only confirmed that Canada must conduct itself according to the high standards required of a fiduciary in its dealings with a Band *prior to* the taking of surrender, but also set out the principles by which it would be determined whether that duty had been met. As the Commission stated in its report concerning the Moosomin surrender claim:

> The Court's comments on the question of pre-surrender fiduciary obligation may be divided into those touching on the *context* of the surrender and those concerning the substantive *result* of the surrender. The former concern whether the context and process involved in obtaining the surrender allowed the Band to consent properly to the surrender under section 49(1) and whether its understanding of the dealings was adequate. In the following analysis, we will first address whether the Crown's dealings with the Band were "tainted" and, if so, whether the Band's understanding and consent were affected. We will then consider whether the Band effectively ceded or abnegated its autonomy and decision-making power to or in favour of the Crown.
>
> The substantive aspects of the Supreme Court's comments relate to whether, given the facts and results of the surrender itself, the Governor in Council ought to

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[282] ICC, *Inquiry into the 1907 Reserve Land Surrender Claim of the Kahkewistahaw First Nation* (Ottawa, February 1997), (1998) 8 ICCP 3 at 76.

[283] Sub nom *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25, 130 DLR (4th) 193.

> have withheld its consent to the surrender under section 49(4) because the surrender transaction was foolish, improvident, or otherwise exploitative.[284]

As a result, it can be seen that the Court has established at least four distinct benchmarks by which Canada's conduct in the exercise of its pre-surrender fiduciary obligations will be measured: where a Band's understanding of the terms of the surrender is inadequate; where the conduct of the Crown has tainted the dealings in a manner that makes it unsafe to rely on the Band's understanding and intention; where the Band has abnegated its decision-making authority in favour of the Crown; and where the surrender is so foolish or improvident that it must be considered exploitative.

In the application of the foregoing principles to the facts of this inquiry, we must also consider the question of the onus of proof. We have stated that, in accordance with the Specific Claims policy, the claimant bears the onus of establishing that Canada breached its lawful obligation in taking a surrender from the Band in 1909. This position is consistent with the "guiding principle" referred to in the majority and minority judgments in *Apsassin*, mandating that the decisions of aboriginal people with respect to the surrender of their lands be respected and honoured.[285] Notwithstanding the above, however, McLachlin J (as she then was) pointed out that the trial judge was correct in his view that a fiduciary involved in a conflict of interest "bears the onus of demonstrating that its personal interest did not benefit from its fiduciary power.[286]

The trial judge, Addy J, had drawn an analogy based on the fiduciary relationship between the Crown and a band, on the one hand, and, on the other, the various "special" or "confidential" relationships that the law of contract recognizes as giving rise to a presumption that the stronger party has exerted influence over the weaker. In the above situation, the law will require the stronger party to bear the onus of rebutting the presumption of undue influence.

In the context of a challenge to the validity of a surrender, however, Addy J stated:

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[284] ICC, *Inquiry into the 1909 Reserve Land Surrender Claim of the Moosomin First Nation* (Ottawa, March 1997), (1998) 8 ICCP 101 at 182–83.

[285] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25, 130 DLR (4th) 193 at 358 (SCR) [majority], 371 [minority].

[286] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25, 130 DLR (4th) 193 at 379 (SCR).

> Finally, even where there exists a special relationship between the parties, when an agreement in writing is being challenged and especially an indenture under seal such as the present one, it seems that there would have to be something more than a bare allegation of improper conduct before there is any duty on the person in the dominant position to adduce evidence to establish that the special duty was properly fulfilled.[287]

Undoubtedly, the circumstances of each case will determine whether the above presumption arises, and, as a consequence, whether the onus has been shifted to Canada to rebut the allegation that it improperly exerted influence to obtain the surrender. Justice McLachlin's judgment in *Apsassin,* however, appears to indicate that, in circumstances where Canada faces conflicting political pressures in the form of preserving the land for the band, on the one hand, and, on the other, making it available for sale to other parties, Canada bears the onus of demonstrating that it did not breach its fiduciary duty to the band.[288]

Finally, we are mindful that the above principles regarding the onus of proof, which were developed by the courts to provide equitable relief in circumstances where it would be unfair to allow an agreement to stand, are subject to certain bars to relief. One circumstance in which the courts will decline to grant relief to a weaker party, despite the fact that undue influence has been alleged or presumed, is where that party has affirmed the transaction, once the possibility for undue influence has ended.[289] In other words, the presumption may be rebutted by the weaker party's acquiescence after the fact.

A discussion of the application of the above principles to the facts of this case follows.

Inadequate Understanding

In his judgment for the majority in the *Apsassin* case, Justice Gonthier wrote that he would have been "reluctant to give effect to this surrender variation if [he] thought that the Band's understanding of its terms had been inadequate, or if the conduct of the Crown had somehow tainted the dealings in a manner which made it unsafe to rely on the Band's understanding and intention."[290]

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[287] *Apsassin v. Canada (Department of Indian Affairs and Northern Development),* [1988] 3 FC 20 at 65.

[288] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development),* [1995] 4 SCR 344, [1996] 2 CNLR 25, 130 DLR (4th) 193 at 379 (SCR), McLachlin J.

[289] S.M. Waddams, *The Law of Contract,* 4th ed. (Toronto: Canada Law Book, 1999), paragraph 552, citing *McCarthy v. Kenny,* [1939] 3 DLR 556 (Ont. SC).

The Key First Nation submits that an *adequate* understanding of the terms of a surrender, within the meaning contemplated by the Supreme Court in *Apsassin*, requires that a band give its *informed* consent to the surrender.[291] Based on the evidence in this case, counsel contends that The Key Band clearly could not have expressed any informed consent to the 1909 surrender. First, he says that there is no evidence that the department ever explained to The Key Band all the relevant facts surrounding the surrender, or any of the other options available to it as an alternative to surrender, before the May 18, 1909, vote.[292] Counsel has listed some of the information that he feels ought to have been provided to the Band:

> ... the effect of a surrender; the option to give the surrender, or not to give the surrender, material background facts to the surrender, or legal advice; any technical advice about the agricultural or economic benefits or drawbacks of a surrender; that they were giving up their rights to the Indian reserve lands forever; that a surrender of the sort in question was permanent and irrevocable; the short or long term implications of a surrender; whether or not a surrender was in the best interests of the Band; the nature of the proposed surrender, its gravity, any material risks and any special or unusual risks; what the risks were in proceeding with a surrender or what the risks were in not proceeding with the surrender; whether it was more in the interests of the Band to seek an exchange of land; what the other options were for acquiring farm equipment (i.e. to lease some land to acquire any necessary funds as a means of generating money to be used to assist the band or to purchase farm equipment, rather than surrendering and selling the land); that the surrender was for the benefit of others; that the government was interested in taking the surrender to acquire Indian reserve land for non-Aboriginal settlement and not for the benefit of the Band; that the department may not have been able to get a good price for the land; or that Graham himself considered that the department should supply any farm equipment that the Band needed.[293]

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[290] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development),* [1995] 4 SCR 344, [1996] 2 CNLR 25, 130 DLR (4th) 193 at 362 (SCC), Gonthier J.

[291] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 2, p. 209.

[292] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 2, p. 217.

[293] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 2, pp. 222–23.

In further support of his contention that the Band's understanding of the surrender and its consequences was inadequate, counsel points to the lack of any evidence that the surrender document was ever explained to the Band as a whole, or that the affidavit of May 19, 1909, was ever explained to Chief The Key.[294]

Furthermore, the Band points to the significance of the absence of an interpreter at the surrender meeting and the fact that Chief The Key marked the surrender affidavit on that occasion, especially since some band members, including Chief The Key, did not speak English. According to counsel for the First Nation, the fact that some band members in 1909 may have been able to speak some English does not imply that they could have adequately understood or translated the technical legal terms of a surrender document.[295] In this context, counsel submits that there was an additional obligation on the representatives of the department to ensure that the Band received independent legal advice concerning the effect of a surrender.[296]

Finally, the First Nation takes the position that The Key Band's participation in surrender discussions in 1903 does not imply that it had an adequate understanding of the 1909 surrender. In counsel's view, the fundamental nature of each of the two events was completely different, since the first surrender contemplated a land exchange, whereas the latter concerned a surrender for sale.[297]

Not surprisingly, Canada takes the position that The Key Band appreciated the nature and consequences of the 1909 surrender, in that its members understood that they were giving up forever all rights to the surrendered land.[298]

In Canada's view, the most persuasive evidence in support of the position that the Band's understanding was adequate is found in three facts: first, surrenders had been discussed with the Band since 1902–03; second, Chief The Key understood that a surrender involved a "taking" of reserve land; and, third, this knowledge formed the basis of the Chief's initial opposition to the 1903 proposal.[299] Counsel for Canada also states that the failure to provide an interpreter did not constitute a breach of its fiduciary obligation, since the evidence indicates that band member George Brass (who was in attendance at the surrender meeting) was a noted interpreter for the Band.[300]

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[294] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 2, p. 222.

[295] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 2, pp. 223–25.

[296] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 2, p. 226.

[297] Reply Submissions on Behalf of The Key First Nation, June 8, 1999, pp. 36–38.

[298] Submission on Behalf of the Government of Canada, May 27, 1999, p. 72.

In our consideration of the above issue, we note that the First Nation's submission emphasizes that The Key Band lacked the information, including independent legal advice, necessary for it to form an *informed* consent to the surrender. Because it was raised and discussed at trial in *Apsassin,* this issue has acquired some significance in the context of the discharge of the onus of proof where undue influence had been presumed owing to the existence of a "special relationship."

First, given the remarks of Justice McLachlin in *Apsassin* concerning the effect of conflicting political pressures on the Crown, it appears that Canada in this case bears the onus of establishing that it did not exert undue influence on the Band to obtain the surrender, and that the Band's understanding of the nature and effect of the surrender was adequate. The record in this inquiry clearly establishes that, at the time of the surrender, the government had in place a policy to free up unused Indian lands for non-aboriginal settlement.

The proposition that Canada bears the onus of establishing that the Band's consent to the surrender was "informed" was raised at trial in *Apsassin*. In this context, Justice Addy stated:

> [C]ounsel for the plaintiffs ... went on to state that, in view of the relationship existing between the parties, it was now incumbent upon the defendant to prove positively that some 16 matters ... had been explained to the Band before informed consent could be found to have existed and that, failing the discharge of this burden, the plaintiffs would succeed. In the first place, I totally reject the argument that all these matters had to be explained. Many of them are redundant or irrelevant, others would obviously be known to the Indians, and others would be required only if they were not only dependant persons but actually *non compos mentis*, in which case no consent could validly be obtained. In the second place, it would be manifestly ludicrous to require now, 40 years after the event, when all of the persons who might

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[299] Submission on Behalf of the Government of Canada, May 27, 1999, pp. 72–73.

[300] Submission on Behalf of the Government of Canada, May 27, 1999, pp. 74–75, citing Rev. Harry B. Miller, *These Too Were Pioneers: The Story of The Key Indian Reserve No. 65 and the Centennial of the Church, 1884–1984* (Melville, Sask.: Seniors Consulting Service, 1984), 17, 23, 74, 95 (ICC Exhibit 6).

> have given advice are either deceased or too senile to testify, that the defendant establish positively that advice was given on all these matters.[301]

Given that the events which form the basis for The Key First Nation's claim occurred more than 90 years ago, we adopt the approach articulated by Justice Addy. We do not require that Canada, in order to discharge the burden upon it, establish by positive evidence that advice was given on all the matters referred to earlier by counsel for the First Nation. We are supported in this view by our review of both judgments of the Supreme Court in *Apsassin,* which, while not specifically addressing the foregoing issue, make clear that the burden on Canada is not as onerous as alleged by counsel for the First Nation.

This determination does not dispose of the issue, however. The test articulated by Addy J in *Apsassin,* and approved by Justice Gonthier in the Supreme Court, requires us to determine whether the evidence establishes that the eligible voting members of the Band understood that, by the surrender, they were giving up forever all rights to their reserve.[302] In the recent Duncan's inquiry, we determined that the relevant factors to be examined in the course of the above determination included whether the Band had been aware of the surrender plan for some time before the event, and whether the matter appeared to have been discussed and the terms negotiated before the vote.[303]

In the current inquiry, Canada has adduced evidence that the Band had discussed, and that a majority of its members had voted in favour of, a surrender of the same land in 1903. The earlier proposal had also contemplated a sale of certain portions of the reserve to fund the acquisition of agricultural implements.[304] At that time, Chief The Key voted against the proposal, fearing, according to Agent Carruthers, that "it was the thin edge of the wedge, and that his whole Reserve would ultimately be taken from him."[305] Subsequently, according to the agent, the Chief acknowledged that the plan was for the good of the Band. This change in view indicates to us that Chief The Key, who was still Chief in 1909, understood not only the nature and effect of the proposed 1903 surrender but also its terms, which, with the exception of the exchange portion, were substantially similar to the terms of the surrender at issue in this inquiry.

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[301] *Apsassin v. Canada (Department of Indian Affairs and Northern Development),* [1988] 3 FC 20 at 65 (TD).

[302] *Apsassin v. Canada (Department of Indian Affairs and Northern Development),* [1988] 3 FC 20, 1 CNLR 73 at 129–30 (TD); *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development),* [1995] 4 SCR 344 at 359, Gonthier J.

[303] ICC, *Duncan's First Nation Inquiry Report on: 1928 Surrender Claim* (Ottawa, September 1999), 195.

[304] "Record of Vote," The Key Band, December 13, 1903 (ICC Documents, p. 357).

There is also evidence that the Band apparently initiated surrender discussions with Agent Blewett in July 1908, and that the terms of the surrender (in particular the amount of the immediate payment) were renegotiated by the Band during a meeting with Inspector Graham in January 1909.[306] As well, it appears that, in April 1909, members of the Band inquired of the department when the surrender would be taken.[307]

On the basis of the above, we conclude that the Band's understanding of the nature, effect, and terms of the surrender was adequate, and, as a result, we hold that Canada has discharged the burden upon it. In the alternative, we note that band members appeared to affirm the surrender by actions taken long after any undue influence could still have been in existence. These actions include a request made in June 1911 by Chief The Key and the Headmen of the Band for interest payments accruing from the sale proceeds of the surrendered land.[308] As a result, Canada has not breached its fiduciary duty to the Band on this ground.

Tainted Dealings

As discussed earlier in this report, Justice Gonthier, writing for the majority in *Apsassin*, indicated that he would be reluctant to give effect to a surrender if the conduct of the Crown had somehow tainted the dealings in a manner that made it unsafe to rely on the Band's understanding and intention. In this case, The Key First Nation has argued that a number of circumstances surrounding the taking of the surrender amount to "tainted dealings" within the meaning contemplated by Justice Gonthier, and that, as a result, Canada breached the fiduciary duty it owed to the Band.

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[305] H.A. Carruthers to David Laird, March 11, 191, NA, RG 10, vol. 3561, file 82/1 (ICC Documents, pp. 369–72).

[306] W.M. Graham to Frank Pedley, January 21, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, pp. 460–62).

[307] W.G. Blewett to J.D. McLean, April 19, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, p. 469).

[308] A.A. Crawford to Secretary, Department of Indian Affairs, June 28, 1911 (ICC Documents, p. 508).

First and foremost, the First Nation submits that it was not in the best interests of the Band that the land be surrendered and sold. Although the express justifications for the surrender were that the quantity of reserve land was in excess of the Band's needs, and that capital was required to purchase implements, counsel for the First Nation submits that the evidence does not support these reasons.[309] To the contrary, the evidence, in his view, indicates that the Band was self-sufficient, that it was actively engaged in stock raising, and that it was purchasing its own implements.

The evidence referred to consists of information provided by departmental officials of the day. For example, Agent Blewett's March 1909 report stated that "these Indians have almost all the necessary implements, and are buying all needed from their own resources."[310] Counsel for the First Nation points out that Blewett's report of the following year, which followed the surrender but predated the sale of the surrendered land, was essentially to the same effect.[311] As well, the "Land Sales Research" report,[312] prepared for the Commission in July 1998, appears to indicate that only a fraction of the proceeds generated by the sale of the surrendered lands was actually spent on implements and related expenditures.

Similarly, the notion that the Band had too much land for its own use is contradicted, in the First Nation's view, by evidence such as Agent Jones's warnings of 1895[313] and 1899[314] of anticipated hayland shortages due to the increasing numbers of livestock. Also seen as significant by the First Nation is the department's 1904 advice to Agent Carruthers to the effect that it might not be prudent to surrender the eastern portion of the reserve (as proposed in 1903) because the original surveyor had appeared to believe that the land contained hay swamps useful to stock growers.[315] Moreover, counsel finds it suspicious that Inspector Graham's memorandum of January 1906, stating that the Band had "sufficient land" for its purposes, made no mention of an excess of land, yet in 1908 Graham advised his superiors that a surrender would still leave the Band with more land than it could ever use.[316]

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[309] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 2, pp. 236–38.

[310] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 2, pp. 256, citing W.G. Blewett, "Annual Report," March 3, 1909, Canada, Parliament, *Sessional Papers*, 1910, Department of Indian Affairs, "Annual Report," 1909 (ICC Documents, p. 468).

[311] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 2, p. 258, citing W.G. Blewett to Frank Pedley, April 11, 1910, Canada, Parliament, *Sessional Papers*, 1911, Department of Indian Affairs, "Annual Report," 1910 (ICC Documents, p. 494).

[312] Public History Inc., " The Key Band 1909 Surrender Land Sales Research," July 1998 (ICC Exhibit 7).

[313] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 2, p. 266, citing W.E. Jones to DSGIA, March 28, 1895 (ICC Documents, pp. 269–71).

[314] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 2, p. 267, citing W.E. Jones to Clifford Sifton, August 30, 1899, Canada, Parliament, *Sessional Papers*,1900, No. 9, Department of Indian Affairs, "Annual Report," 1899 (ICC Documents, pp. 300–01).

Another factor that the First Nation considers to be evidence of "tainted dealings" within the meaning of *Apsassin* was the 1906 amendment to the *Indian Act*, which changed the maximum amount of the immediate and direct payment that could be made to band members on a land surrender from 10 to 50 per cent of the purchase price of the land. According to the First Nation, this amendment was openly intended to induce land surrenders in order to facilitate non-aboriginal settlement, a policy reiterated in Deputy Superintendent General Pedley's Annual Report for 1908.[317]

Furthermore, Inspector Graham acknowledged that he had "persuaded" the Band to surrender 17 sections of land instead of the 13 originally contemplated, an action which the First Nation submits is evidence of an attitude that favoured the promotion of surrenders over the best interests of the Band.[318] The First Nation also points out that Graham offered the Band a cash inducement of $100 per capita at the very meeting at which this "persuasion" had taken place. As a result, in the

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[315] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 2, pp. 267–68, citing H.A. Carruthers to David Laird, December 21, 1903, NA, RG 10, vol. 3561, file 82/1 (ICC Documents, pp. 358–64).

[316] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 2, pp. 270–74, citing W.M. Graham to Secretary, Department of Indian Affairs, January 18, 1906, NA, RG 10, vol. 7770, file 27117-2 (ICC Documents, p. 439); W.M. Graham to Secretary, Department of Indian Affairs, August 13, 1908, NA, RG 10, vol. 4039, file 329759 (ICC Documents, pp. 455–56).

[317] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 2, pp. 246–48, citing Frank Oliver, June 15, 1906, Canada, House of Commons, *Debates*, 1906, vol. 111 (ICC Documents, pp. 423–30); Frank Pedley in Canada, *Sessional Papers*, 1909, Department of Indian Affairs, "Annual Report," 1908 (ICC Documents, p. 445).

[318] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 2, pp. 249–50, citing W.M. Graham to Frank Pedley, January 21, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, pp. 460–62).

First Nation's view, Canada failed in its duty to properly manage the competing interests of the Band, on the one hand, and, on the other, the promoters of non-aboriginal agricultural settlement.[319]

In summary, the First Nation submits that all the foregoing circumstances "add up to an overwhelming indication that tainted dealings surrounded the purported surrender" of The Key reserve in 1909. As a result, counsel concludes that, in the spirit of Justice Gonthier's remarks in *Apsassin*, it would be unsafe to rely on the apparent intention of the Band at the time.

In contrast, Canada argues that a close examination of all the factors relevant to this issue leads to the conclusion that its conduct did not amount to "tainted dealings" of the type contemplated by Justice Gonthier.

First, counsel for Canada submits that the surrender was initiated by the Band itself in July 1908, in the absence of pressure from any third parties or from Canada. In his view, the evidence indicates that the Band restated its intention to surrender the land to the department in January 1909, and again in April 1909.[320] He points out that there exists no evidence of a "concerted campaign" or "continual barrage" of local and departmental pressure, as was found to exist in the Moosomin and Kahkewistahaw inquiries conducted by this Commission, but only a single request from Dr Cash, the local MP.[321] Significantly, in Canada's view, Deputy Superintendent General Pedley did not pursue the matter with the Band as a result of Dr Cash's letter, but instead disposed of his inquiry in a fairly summary fashion.

Furthermore, Canada states that the surrender vote was not timed or staged to obtain a technical consent from the Band. Counsel points out that the vote took place almost a year after the Band's initial request, and that, at the time of the vote, The Key Band was not poor, starving, or without effective leadership.[322] Counsel also submits that the Band, and not Inspector Graham, initiated the increase in the proposed cash advance (from $80 to $100 per capita) at the pre-surrender meeting in January 1909. As a result, he argues that the cash advance could not have been an improper inducement.[323]

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[319] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 2, pp. 300–01.

[320] Submission on Behalf of the Government of Canada, May 27, 1999, p. 76, citing W.G. Blewett to Department of Indian Affairs, July 24, 1908, NA, RG 10, vol. 4039, file 329759 (ICC Documents, p. 454); W.M. Graham to Frank Pedley, January 21, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, pp. 460–62); W.G. Blewett to J.D. McLean, April 19, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, p. 469).

[321] Submission on Behalf of the Government of Canada, May 27, 1999, p. 75.

[322] Submission on Behalf of the Government of Canada, May 27, 1999, pp. 77–78.

As well, Canada takes the position that Inspector Graham's action in "persuading" the Band to surrender 17 sections instead of the original 13 cannot be considered coercive or an example of undue influence because the actual vote took place four months after the "persuasion" in question. Further, counsel submits that the actions or motivations of Inspector Graham in other surrenders should be considered irrelevant, since the issues in this case should be decided solely on the basis of the facts before the Commission in this inquiry.[324]

Finally, Canada submits that the post-surrender conduct of the Band is consistent with the conclusion that its members truly intended to consent to the surrender. The conduct in question includes a subsequent surrender, the lack of any reported contemporaneous objections, and repeated requests concerning receipt of the proceeds of sale of the surrendered land.[325]

In conclusion, Canada submits that there were no "tainted dealings" surrounding the 1909 surrender such that the Band's understanding and intent were impaired in any way.

In the Kahkewistahaw, Moosomin, and Duncan's inquiries, we looked at the manner in which the Crown managed competing interests to determine whether a breach of the fiduciary duty had occurred. Keeping in mind our earlier comments about the onus of proof, our consideration of this issue will involve a determination of whether Canada has established that it acted honourably and in the best interests of the Band when it obtained the surrender.

In this inquiry, as in past inquiries, we find instructive the criteria set out by the trial judge in *Apsassin* in his determination that the dealings in that case were *not* tainted. These criteria include whether the Band knew for some time that an absolute surrender was contemplated; whether the matter had been discussed by the Band and officials of the department on several occasions; whether the Band members had discussed the matter among themselves; whether the matter had been fully discussed at the surrender meeting; whether there was evidence that Canada attempted to influence the Band at or before the surrender meeting; whether representatives of the department had explained the consequences of surrender to the Band; and whether the band members understood that, by surrendering, they were forever giving up all rights in their land in exchange for money.

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[323] Submission on Behalf of the Government of Canada, May 27, 1999, p. 80, citing W.M. Graham to Frank Pedley, January 21, 1909 (ICC Documents, pp. 460–62).

[324] Submission on Behalf of the Government of Canada, May 27, 1999, p. 79.

[325] Submission on Behalf of the Government of Canada, May 27, 1999, pp. 78–79.

In the matter before us, it is apparent that the evidence does not include any details of the events which took place at the surrender meeting. We note, however, that surrender discussions between the Band and either the agent or Inspector Graham had taken place on at least three occasions over a period of ten months before the actual surrender meeting, and that those discussions were apparently initiated by the Band. We are aware that Inspector Graham reported in January 1909 that he had "persuaded" the Band to surrender 17 sections of land instead of the 13 originally contemplated. At the same meeting, however, it appears that the Band negotiated an increase in the payment to be received immediately after execution of the surrender from $80 to $100 per capita. Such bargaining indicates to us that both parties renegotiated the terms of the surrender to their advantage.

In previous inquiries in which the Commission has held that Canada's conduct amounted to "tainted dealings" within the meaning of *Apsassin*, we have at times seen evidence of a concerted and sustained campaign of pressure brought to bear on the Band by departmental officials over a period of years. In the current inquiry, the evidence does not suggest that Canada engaged in such conduct. Rather, it appears that departmental officials dropped the subject of surrender in 1903–04 after the land proposed to be exchanged for the surrendered land was no longer available. Further, unlike the situation in Kahkewistahaw, where pressure was brought to bear on the Band by virtually every figure of authority in the local community over a 22-year period, the evidence before us in this inquiry indicates that the department received only one isolated request concerning the possible surrender of the land, a request that Deputy Superintendent General Pedley disposed of in a summary fashion.

We are aware of the policy of the government of the day to permit surrenders in situations where the department considered that a band was holding land in excess of its needs. This policy, which appeared to be in furtherance of a concurrent policy to encourage non-aboriginal agricultural settlement, arguably placed Canada in a position of conflict of interest of the type contemplated by Justice McLachlin in *Apsassin*. As a result, Canada bears the onus of establishing that it discharged its duty to ensure that its dealings with the Band were conducted honourably. Based on all the foregoing, and especially in the absence of the kind of coercive behaviour referred to above, we conclude that Canada *has* discharged the onus on it to establish that its dealings with the Band were not "tainted" within the meaning of *Apsassin*. As a result, Canada did not breach its fiduciary duty to the Band on this basis.

Cession or Abnegation of Decision-Making Power

The Key First Nation relies on the reasoning of this Commission in the Sumas inquiry[326] (in which we adopted the views of Justice McLachlin in *Apsassin*) that it is necessary to look behind the ostensible consent of the Band to determine whether any unfair advantage has been taken of the Band as a result of its relative vulnerability vis-à-vis the Crown. Applying this test to the facts of the present inquiry, counsel for the First Nation submits that the Band was manipulated into surrendering its land – in effect, ceding its decision-making power to the Crown.[327]

The primary argument offered by the First Nation in support of this allegation concerns the fact that the surrender documents were apparently executed by someone other than the members of the Band. This fact, in conjunction with the absence of any evidence concerning what transpired at the surrender meeting, must lead, in counsel's view, to an inference that "Canada assumed the power of The Key First Nation over whether or not a portion of the Indian reserve of The Key First Nation would be surrendered."[328] According to the First Nation, Canada's representatives were therefore subject to a specific fiduciary duty to act solely in the best interests of the Band, a duty they breached by also considering the interests of non-aboriginal settlers. In this context, the First Nation once again relies on all the foregoing arguments raised in relation to the subject of "tainted dealings."

Canada's perspective on this issue is that the evidence does not support the contention that the Band abnegated or entrusted its power of decision over the surrender to the Crown, for several reasons. First, counsel for Canada states that the subject of surrenders had been discussed with this

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[326] ICC, *Sumas Indian Band: 1919 Surrender of Indian Reserve No. 7 Inquiry* (Ottawa, August 1997), (1998) 8 ICCP 281.

[327] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 2, p. 331.

[328] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 2, pp. 331–32.

Band for seven years, and that the 1909 surrender had been discussed with it for ten months before the vote. Second, the evidence, in counsel's submission, indicates that The Key Band initiated the surrender discussions and met with various departmental officials on at least three occasions before the vote to discuss the merits and terms of the proposed surrender. Third, Canada relies on its prior arguments regarding "adequate understanding" and "tainted dealings" as support for the submission that the Band understood the consequences of the surrender before the vote, and that Canada did not coerce the Band into executing the surrender. Fourth, Canada submits that the Band had effective leadership at the time of the surrender, as Chief The Key had previously proven himself capable of voting against a surrender that he felt was not in the best interests of the Band. Finally, Canada takes the position that the post-surrender conduct of the Band confirms that the Band intended to surrender its land, since it was interested in obtaining the proceeds of sale.[329] In conclusion, Canada submits that The Key Band did not cede to the Crown its power to consent to the 1909 surrender.

It has generally been acknowledged that the judicial basis for this aspect of the pre-surrender fiduciary duty is to be found in the judgment of McLachlin J in *Apsassin*. In her judgment, she drew on several Supreme Court decisions dealing with the law of fiduciaries in the private law context:

> Generally speaking, a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second "peculiarly vulnerable" person: see *Frame v. Smith*, [1987] 2 SCR 99 [[1988] 1 CNLR 152 (abridged version)]; *Norberg v. Wynrib*, [1992] 2 SCR 226; and *Hodgkinson v. Simms*, [1994] 3SCR 377. The vulnerable party is in the power of the party possessing the power or discretion, who is in turn obligated to exercise that power or discretion solely for the benefit of the vulnerable party. A person cedes (*or more often finds himself in the situation where someone else has ceded for him*) his power over a matter to another person. The person who has ceded power *trusts* the person to whom power is ceded to exercise the power with loyalty and care. This is the notion at the heart of the fiduciary obligation.[330]

In the Kahkewistahaw and Moosomin inquiries, one of the most significant factors causing us to conclude that the bands in those inquiries *had* ceded power of consent to the Crown was the state of the Bands' leadership at the time of surrender. In Kahkewisthaw, we found that surrender proposals had been repeatedly rejected by the Band as long as Chief Kahkewistahaw was alive, but that soon after his death, and at a time when the Band had no strong leader, it reversed its position and consented to the surrender. Similarly, in Moosomin, we held that the vacuum in the Band's leadership at the time of the surrender contributed significantly to the cession or abnegation of its decision-making power in granting consent to the surrender of *its* reserve lands. The facts of the present inquiry differ significantly from the above, in that Chief The Key, who had voted against the 1903 surrender proposal reportedly on the basis that he thought it would lead to the whole reserve being "taken" from him,[331] was still Chief of the Band at the time of the 1909 surrender. As a result, we see no evidence that The Key Band was powerless at the relevant time in the way that characterized the bands in the earlier inquiries.

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[329] Submission on Behalf of the Government of Canada, May 27, 1999, pp. 90–91.

[330] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1995), [1995] 4 SCR 344, [1996] 2 CNLR 25, 130 DLR (4th) 193 at 371–72 (SCR), McLachlin J. Emphasis added.

Similarly, we see no evidence of persistent attempts on the part of departmental officials to secure a surrender despite all obstacles, nor any evidence that the members of the Band were in any way resigned to the inevitability of the event. Rather, the evidence indicates that band members initiated surrender discussions; that they renegotiated one of its terms in their favour; that they made inquiries of the agent as to when the surrender might be expected; and, after the fact, that they took an interest in the receipt of the sale proceeds. As a result, we conclude that The Key Band did not cede or abnegate its decision-making power regarding the surrender to or in favour of the Crown.

Exploitative Bargain

The First Nation submits that the 1909 surrender of a portion of The Key Reserve was "exploitative" within the meaning contemplated by the Supreme Court of Canada in the *Apsassin* case. In the words of Justice McLachlin:

> It follows that under the *Indian Act*, the Band had the right to decide whether to surrender the reserve, and its decision was to be respected. At the same time, if the Band's decision was foolish or improvident – a decision that constituted exploitation

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[331] H.A. Carruthers to David Laird, March 11, 1904, NA, RG 10, vol. 3561, file 82/1 (ICC Documents, pp. 369–72).

> – the Crown could refuse to consent. In short, the Crown's obligation was limited to preventing exploitative bargains.[332]

The First Nation takes the position that the surrender in this case was foolish and improvident because it lacked foresight or concern for the future of the Band. In counsel's view, there was no good economic or agricultural reason for the Band to have surrendered the land, since the evidence indicates that it was self-sufficient in cattle raising and that the majority of the surrendered land was either arable or useful for grazing.[333] Counsel further submits that a surrender of some 11,500 acres, amounting to nearly one half of the reserve, would inevitably have a negative impact on the Band's agricultural future, especially since there existed no equivalent lands for which the surrendered land could be exchanged. As a result, the First Nation concludes that the surrender can only be considered exploitative, especially since departmental officials had consistently taken the view that the Band's future agricultural prospects were promising. Therefore, in the First Nation's opinion, the Governor in Council was subject to a fiduciary obligation to refuse to consent to the surrender.[334]

For its part, Canada takes the position that the surrender was not "exploitative," as that term has been defined by the Supreme Court, but rather was "entirely reasonable when viewed from the perspective of the Band at the time." Counsel for Canada frames the test in the following terms:

> Can it be said, at the time and from the Band's perspective, that the surrender made some sense?[335]

To answer this question, counsel submits that a number of factors must be reviewed: the use of the land prior to surrender; the quantity and quality of the remaining land in the context of the Band's perceived needs and interests; the demographics of the Band; the views of contemporary officials;

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[332] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25, 130 DLR (4th) 193 at 370–71 (SCC).

[333] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 2, pp. 323–24.

[334] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 2, p. 328.

[335] Submission on Behalf of the Government of Canada, May 27, 1999, pp. 81– 82.

the Band's existing and contemplated way of life; and the potential benefits associated with the surrender.

Applying these factors to the evidence presented in this case, Canada submits that the surrender was not exploitative. First, counsel points out that the quantity of land remaining after the surrender significantly exceeded the treaty land entitlement of the band members resident on it, since the Shoal River Indians never followed Chief Key to the new reserve.[336] Second, Canada relies on the report of Serecon Valuation and Agricultural Consulting Inc., prepared at the request of the Commission, to the effect that the surrender did not reduce the productive capacity of the reserve on a per acre basis. In other words, the surrender did not have the effect of taking only the best land.[337]

In addition, counsel for Canada submits that, on the evidence, the surrendered lands were not used by the Band for economic or residential purposes before the surrender. In support of this argument, he cites a local history of the Band which indicates that the majority of the Band had moved to the centre of the reserve by 1908.[338] Further, Agent Blewett's report of July 24, 1908, indicated that the proposed surrender would not cut off any buildings or improvements;[339] similarly, Inspector Graham's report on the pre-surrender meeting advised that the land in question was not being used.[340]

Counsel further states that, although the Band was beginning to make steady agricultural progress in the years leading up to the surrender, its predominant economic activities at that time were hunting and freighting. As a result, there may not have been a pressing need for implements in 1904, when Inspector Graham reported that the department would furnish enough for the Band's needs. In the years that followed, however, the evidence indicates the development of a gradual trend towards farming as a way of life.[341] In Canada's submission, the Band would then have required capital to acquire additional implements. Confirmation that further equipment was required and purchased to meet the Band's expanding farming activities can be found, according to counsel, in the annual reports from 1910 through 1913.[342]

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[336] Submission on Behalf of the Government of Canada, May 27, 1999, pp. 82–83.

[337] Submission on Behalf of the Government of Canada, May 27, 1999, p. 84, citing Serecon Valuation and Agricultural Consulting Inc. to Indian Claims Commission, November 25, 1998, 2 (ICC Exhibit 10A).

[338] Rev. Harry B. Miller, *These Too Were Pioneers: The Story of The Key Indian Reserve No. 65 and the Centennial of the Church, 1884–1984* (Melville, Sask.: Seniors Consulting Service, 1984), p. 38 (ICC Exhibit 6).

[339] W.G. Blewett to Department of Indian Affairs, July 24, 1908, NA, RG 10, vol. 4039, file 329759 (ICC Documents, p. 454).

[340] W.M. Graham to Frank Pedley, January 21, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, pp. 460–62).

Finally, Canada submits that, after the surrender, The Key Band, comprising 80 to 90 people, was left with more than 8,000 acres of arable land, nearly 2,000 acres of marginally arable land, and almost 5,000 acres of land suitable for pasture.[343] Counsel argues that this quantity was sufficient to provide for the Band's existing and foreseeable needs, with the result that the surrender cannot have been exploitative.

Our decision on this issue is guided by the reasoning of the trial judge in *Apsassin*, which was approved in the Supreme Court of Canada. On the facts in *Apsassin*, Addy J had found that the decision to surrender the reserve made good sense when viewed from the perspective of the Band at the time. In her judgment in *Apsassin*, Justice McLachlin concurred, reasoning that a band's decision to surrender its reserve was to be respected, unless its decision was so foolish and improvident that it constituted exploitation. If the decision was exploitative, however, the Governor in Council, acting pursuant to the surrender provisions of the *Indian Act*, was obliged to withhold its consent.

In our prior inquiries into the surrenders of the Kahkewistahaw and Moosomin reserves, we adopted the notion that the determination whether the bargain was exploitative was to be made from the perspective of the band at the time of surrender. Furthermore, in the Duncan's inquiry, we held that even if the decision to surrender would today be considered misguided, the Crown would not be guilty of a breach of its fiduciary duty under this heading if, *at the time*, it acted honestly and in what it perceived to be the Band's best interests.

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[341] Submission on Behalf of the Government of Canada, May 27, 1999, p. 87, citing W.M. Graham to Frank Pedley, October 3, 1905, Canada, Parliament, *Sessional Papers*, 1906, No. 9, Department of Indian Affairs, "Annual Report," 1905 (ICC Documents, pp. 409–11).

[342] Submission on Behalf of the Government of Canada, May 27, 1999, p. 88, citing W.G. Blewett to Frank Pedley, April 11, 1910, Canada, Parliament, *Sessional Papers*, 1911, Department of Indian Affairs, "Annual Report," 1910 (ICC Documents, p. 494); Public History Inc., *The Key Band 1909 Surrender Land Sales Research* (July 1998), vol. 1, table 3, pp. 35, 37, 38.

[343] Submission on Behalf of the Government of Canada, May 27, 1999, p. 88, citing Serecon Valuation and Agricultural Consulting Inc., *An Historic Agronomic Valuation of Indian Reserve Lands: Key Indian Reserve No. 65, Saskatchewan* (September 1998).

In all the above three inquiries, the determination of this issue largely revolved around the impact of the surrender on the respective bands' way of life and, in particular, on their ability to make a living from agriculture. For example, in Kahkewistahaw, we held that the surrender was exploitative since it had the effect of taking 90 per cent of the arable land located within the reserve. In Moosomin, the Band surrendered its entire reserve of prime farming land in exchange for land of inferior quality elsewhere, a transaction that, in our view, was clearly foolish and improvident. In the Duncan's inquiry, however, after asking ourselves whether the land remaining after the surrender would be sufficient to satisfy the Band's existing and foreseeable agricultural needs, we concluded that the surrender could not be considered exploitative in the context of the time.

It appears that the issue of whether The Key surrender constituted an "exploitative bargain" within the meaning of *Apsassin* will likewise be determined by reference to the economic activities of the Band and the quality and quantity of reserve land surrendered. The evidence in this inquiry indicates that the surrender took nearly one half of the land comprising the reserve, and that all the surrendered land was arable or suitable for grazing. The evidence also indicates that, after 1900, there was a gradual shift in the Band's economic activities from hunting and freighting to agriculture, especially among its younger members. The land remaining in the reserve after the surrender was more or less equal in quality to the land that had been surrendered, according to an expert's report. It is also apparent that the Band, numbering some 80 to 90 individuals, was cultivating approximately 100 acres of land at the time of the surrender, and that, after the surrender, some 8,000 acres of arable land, plus more than 5,000 acres of grazing land, remained in its control. This reasoning is not meant to convey any suggestion that the Crown may justify a surrender by the mere fact that the land remaining in a reserve after the surrender is sufficient to fulfil, or in fact exceeds, the Band's treaty land entitlement. From the perspective of the Band at the time, however, and in light of the fact that the Band itself apparently initiated surrender discussions with representatives of the department, we conclude that this surrender cannot be considered "exploitative" within the meaning contemplated by the Supreme Court in *Apsassin*.

PART V

CONCLUSIONS AND RECOMMENDATION

The Commission has been asked to inquire into and report on whether the Government of Canada owes an outstanding lawful obligation to The Key First Nation. We have concluded that it does not.

First, we have concluded that there is no evidence in this inquiry that the terms of Treaty 4 should be interpreted to include notions of the Band's traditional clan governance. As a result, we hold that there is no evidence of a conflict between the treaty and the surrender provisions of the *Indian Act*, as there is no evidence before us that the parties at the time of treaty intended to establish within its terms a particular standard or threshold of consent.

Second, we find that the Shoal River Indians were not members of The Key Band at the time of the surrender, owing to the mutual intention of the Shoal River Indians, on the one hand, and of the followers of Chief The Key, on the other, to live as autonomous bands. In the alternative, we find that the Shoal River Indians did not habitually reside on or near, or were interested in, IR 65 at the time of the surrender, with the result that they were not eligible to vote pursuant to section 49(2) of the *Indian Act*.

Finally, we find that, in the 1909 surrender of IR 65, the procedural requirements of section 49 of the *Indian Act* were satisfied, and it does not appear to us that the Crown breached any fiduciary obligations to the Band in the course of the surrender proceedings. Specifically, we see no evidence that the Band's understanding of the terms of the surrender was inadequate, that the conduct of the Crown tainted the dealings in a manner that would make it unsafe to rely on the Band's understanding and intention, that the Band ceded or abnegated its decision-making authority to or in favour of the Crown in relation to the surrender, or that the surrender was so foolish or improvident as to be considered exploitative.

In conclusion, we therefore recommend to the parties :

> **That the claim of The Key First Nation regarding the surrender of a portion of IR 65 not be accepted for negotiation under Canada's Specific Claims Policy.**

FOR THE INDIAN CLAIMS COMMISSION

Roger Augustine

P.E. James Prentice, QC
Commission Co-Chair

Carole T. Corcoran
Commissioner

Roger J. Augustine
Commissioner

Dated this 27th day of March, 2000

APPENDIX A

THE KEY FIRST NATION 1909 SURRENDER INQUIRY

1 Planning conferences

September 12, 1995
June 9, 1997

2 Community sessions

Three community sessions were held.

1st community session: The Key First Nation, Community Centre, January 24, 1996. The Commission heard evidence from Chief O'Soup, Raymond Brass, Susan Brass, Clarice Brass, Sterling Brass, Edwin Crane, Charles Cochrane, and Norman Audy.

2nd community session: The Key First Nation, Community Centre, November 20, 1997. The Commission heard evidence from Chief Campbell Papequash, Charles Cochrane, Edwin Crane, Miles Musqua, Helen Stevenson, Greg Brass, and Sterling Brass.

3rd community session: The Key First Nation, Community Centre, March 10, 1998. The Commission heard evidence from Chief William Papequash, William Papequash, Dorothy Crow, Emily Durocher, Desmond Key, Auntie Helen, Darrell Papequash, Helen Stevenson, Ronald Gordon, Darrell Cote, Harold Papequash, Sterling Brass, Susan Brass, Charles Cochrane, and Fred Brass.

3 Expert session

Regina, Saskatchewan, January 25, 1999

The Commission heard evidence from Guy Magny.

4 Legal argument

Saskatoon, Saskatchewan, June 14, 1999

5 Content of formal record

The formal record for The Key First Nation 1909 Surrender Inquiry consists of the following materials:

- the documentary record (3 volumes of documents)
- 16 exhibits tendered during the inquiry (including 4 volumes of transcripts of the community and expert sessions)

- written submissions of counsel for Canada and written submissions and rebuttal submissions of counsel for the Key First Nation, including authorities submitted by counsel with their written submissions and transcript of oral submission.

The report of the Commission and letters of transmittal to the parties will complete the formal record of this inquiry.